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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 52

UNITED STATES OF AMERICA, APPELLANT,

vs.

LUDENIA HOWARD, TRADING AS STOKES FISH COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

FILED MARCH 26, 1956

Probable Jurisdiction Noted June 11, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 52

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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1 United States District Court, Southern District of Florida, Orlando Division

No. 910-Orl-Cr

UNITED STATES OF AMERICA

vs.

LUDENIA HOWARD, trading as Stokes Fish Company

TRANSCRIPT OF DOCKET ENTRIES

July 20, 1955. Criminal Information.

October 25, 1955. Summons issued returnable at Orlando, November 3, 1955 at 2:00 PM.

November 1, 1955. Summons returned executed.

November 3, 1955. Arraigned and Plead NOT GUILTY.

November 3, 1955. Defendant allowed 10 days to file Motions.

November 14, 1955. Motion by Defendant to Quash Information.

November 14, 1955. Motion by Defendant for Bill of Particulars.

December 29, 1955. Order Granting Motion to Quash Information.

January 27, 1956. Notice of Appeal to the Supreme Court of the United States.

2-3 [File endorsement omitted]

United States District Court, Southern District of Florida, Orlando Division

Case No. 910-Orl. Cr.

[Title omitted]

CRIMINAL INFORMATION—Filed July 20, 1955

The United States Attorney charges:

On or about the 16th day of May, 1955, at Sanford, Seminole County, Florida, in the Southern District of Florida, LUDENIA HOWARD, trading as Stokes Fish Company, delivered to the Railway Express Agency, Inc., for transportation from Sanford, in the State of Florida, to Macon, in the State of Georgia, 150 pounds of fresh water bream, fresh water crappie, and fresh water black bass, and such transportation was then and there contrary to the laws of the State of Florida; in violation of Section 852, Title 16, United States Code.

(S.) Vernon W. Evans, Jr.,
Assistant United States Attorney.

Duly sworn to by Vernon W. Evans, Jr. Jurat omitted in printing.

4 [File endorsement omitted]

United States District Court, Southern District of Florida,
Orlando Division

[Title omitted]

Motion to Quash Information—Filed November 14, 1955

Comes now the Defendant, by her undersigned attorneys, and moves this Honorable Court to quash the criminal information filed against the Defendant, Ludenia Howard, upon the following grounds, to-wit:

1. The said Information fails to state a cause of action against this Defendant.
2. The said Information fails to allege that the Defendant, Ludenia Howard, had any knowledge of the nature of the said shipment delivered for said transportation.
3. The said Information fails to allege that Ludenia Howard personally delivered the alleged fish to the Railway Express Agency, Inc. for transportation.
4. Said Information fails to allege that the said Defendant, Ludenia Howard, had any personal connection with the said transaction in any way, or that she had any knowledge of the said transaction.

Thacker and Thacker,
By (S.) O. S. Thacker,
Attorneys for Defendant,
P. O. Box 527,
Kissimmee, Florida.

I hereby certify that copy hereof has been furnished Vernon W. Evans, Jr., Esq., Assistant United States Attorney, P. O. Bldg., Tampa, Florida, by mail, this 10th day of November, A. D. 1955.

(S.) O. S. THACKER,
Attorney.

5 [File endorsement omitted]

United States District Court, Southern District of Florida, Orlando Division

[Title omitted]

ORDER ON MOTION TO QUASH INFORMATION—December 29, 1955

This cause coming on for hearing upon Defendant's Motion to Quash Information, and the same having been argued by counsel, and it being called to the Court's attention that there is no law of the State of Florida prohibiting the transportation of the fish described in the said Information, and the Court taking judicial notice that there is no such law; but the only prohibition against the same being the rules of the State Game and Fresh Water Fish Commission; and it being the further opinion of the Court that the rules and regulations of the said Game and Fresh Water Fish Commission do not constitute the law of the State of Florida as described by and contemplated in Section 852, Title 16, United States Code, which violation was specifically charged in the Information filed herein; it is, therefore

ORDERED, ADJUDGED AND DECREED that the said Information be, and the same is hereby quashed, and the Defendant discharged.

DONE AND ORDERED in Chambers at Orlando, Florida, this 29th day of December, A. D. 1955.

(S.) WILLIAM J. BARKER,
As Judge of the Above Court.

6 [File endorsement omitted]

In the United States District Court for the Southern District of Florida, Orlando Division

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 27, 1956

I. Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order entered on December 29, 1955, quashing the information which charged that defendant transported black bass in interstate commerce contrary to the law of Florida from which such bass was transported, in violation of 16 U.S.C. 852.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Transcript of docket entries.
2. Information.
3. Motion to Quash.
4. The Order Quashing the Information.
5. Notice of Appeal.

7 III. The following question is presented by this appeal:

Whether the district court erred in construing the word "laws," as used in the Black Bass Act, 16 U.S.C. 852 (which prohibits interstate transportation of black bass if such transportation is contrary to the laws of the state from which the fish is transported) as not including regulations issued by the Florida Game and Fresh Water Fish Commission, where (1) the Commission was created by a constitutional amendment which vested it with sole authority to regulate transportation of fresh water fish, and (2) the constitutional amendment provided that the legislature could pass laws in aid of the provisions of the said amendment but not inconsistent therewith.

Simon E. Sobeloff,
Solicitor General.
By (S.) Joseph P. McNulty,
Assistant United States Attorney,
Southern District of Florida.

8 Affidavit of Service (omitted in printing)

9 Clerk's Certificate to foregoing transcript (omitted in printing).

10

Supreme Court of the United States

Order Noting Probable Jurisdiction—June 11, 1956

Appeal from the United States District Court for the Southern District of Florida.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

June 11, 1956.

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Office Supreme Court, U. S.
FILED
MAY 28 1956
HAROLD B. WILLEY, Clerk

No. [illegible]

In the Supreme Court of the United States

October Term, 1955

United States of America, Appellant,

v.

Lucretia [illegible] [illegible]

[illegible]

Appeal from the United States District Court for the [illegible] District of [illegible] [illegible]

[redacted]

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

LUDENIA HOWARD, TRADING AS STOKES FISH COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

STATEMENT AS TO JURISDICTION

OPINION BELOW

The order of the district court quashing the information has not been reported. A copy thereof is set forth in Appendix A, *infra*, pp. 18–19.

JURISDICTION

On December 29, 1955, the district court entered an order quashing the information and discharging defendant on the ground that the information did not charge an offense under the Federal Black Bass Act, as amended (App. A, *infra*, pp. 18–19). A notice of appeal to this Court was filed in the district court on January 27, 1956 (R. 1). Jurisdiction of this Court to review on direct appeal the decision of the district court quashing the information, on the ground that it did not charge a crime within the meaning of the statute upon which it was founded, is conferred by 18 U. S. C. 3731.

QUESTION PRESENTED

Whether the district court erred in construing the term "law of the State," as used in the Federal Black Bass Act (which prohibits interstate transportation of black bass and other fish if such transportation is contrary to the law of the state from which the fish is transported), as not including regulations issued by the Florida Game and Fresh Water Fish Commission, where (1) the Commission was created by a Florida constitutional amendment which vested it with sole authority to regulate transportation of fresh water fish in Florida and (2) the constitutional amendment provided that the legislature could pass laws in aid of the provisions of the amendment but not inconsistent therewith.

FEDERAL STATUTE AND STATE CONSTITUTION, STATUTES, AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Black Bass Act of May 20, 1926, as amended, c. 346, 44 Stat. 576, 46 Stat. 845, 61 Stat. 517, 66 Stat.

736, 16 U. S. C. 852 and 853, and the applicable provisions of the Florida constitution, statutes, and regulations are set forth in Appendix B, *infra*, pp. 20–26.

STATEMENT

Sections 2 and 7 of the Federal Black Bass Act of May 20, 1926, as amended, App. B, *infra*, pp. 20–21, make it an offense for any person to transport any black bass or other fish from any state if such transportation is contrary to the law of the state from which the fish is transported. A criminal information was filed against the appellee, in the United States District Court for the Southern District of Florida, on July 20, 1955 (R. 1), charging the defendant with having violated the Federal Black Bass Act by transporting fish across the Florida border on or about May 16, 1955, contrary to the laws of that state (R. 2–3). The district court quashed the information on the ground that there was no law of Florida which prohibited the transportation of the said fish, holding that the rules and regulations of the Game and Fresh Water Fish Commission of Florida, which contain the only prohibition by Florida of the out-of-state transportation of the fish in question, do not constitute a "law of the State" within the purview of the Federal Black Bass Act.

The Game and Fresh Water Fish Commission of Florida was created in 1942 by a constitutional amendment (Article IV, Section 30, Constitution of Florida), *infra*, pp. 21–22, which provides that "from and after January 1, 1943, the management, restoration, conservation and regulation of the birds, game, fur bearing animals, and fresh water fish of the State of Florida, and the acquisition, establishment, control and management, of hatcheries, sanctuaries, refuges, reservations, and all other property now or hereafter owned or used for such purposes by the State of Florida, shall be vested in [the] Commission * * *". The Amendment gave the Commission "power to fix bag limits and to fix open and closed seasons, on a state-wide, regional or local basis, as it may find to be appropriate, and to regulate the manner and method of taking, transporting, storing and using birds, game, fur bearing animals, fresh water fish, reptiles, and amphibians". The amendment also provided that "The Legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment, and all existing laws inconsistent herewith shall no longer remain in force and effect.[1] All laws fixing penalties for the violation of the provisions of this amendment and all laws imposing license taxes, shall be enacted by the Legislature from time to time."

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[1] Pursuant to this latter provision, the legislature in 1951 repealed a statute (Fla. Stat., Sec. 372.29) which had prohibited the out-of-state transportation of fish. Laws 1951, c. 26766, sec. 6, F. S. A. 372.29 (1954 Cum. Pocket Part).

Section 372.021 of the Florida Statutes Annotated (Laws 1943, c. 21945, Sections 4 and 5), *infra*, pp. 22–24, implements the constitutional amendment by authorizing the Game and Fresh Water Fish Commission to exercise "the powers, duties and authority granted by Section 30, Article IV of the Constitution of Florida by the adoption of rules, regulations and orders", and prescribes the procedure for promulgation of the Rules. Rule 14.01 of the Commission's Rules and Regulations, *infra*, pp. 25–26, now prohibits, except as therein otherwise provided, the transportation of black bass and other species of fresh water fish out of Florida. Section 372.83 of the Florida Statutes Annotated (Laws 1943, c. 21945, Section 6, as amended, *infra*, p. 25) makes it a misdemeanor to violate "any rule, regulation or order of the game and fresh water fish commission adopted pursuant to § 30, article 4, of the constitution of this State."[2]

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[2] On July 19, 1954, the Commission by formal resolution determined Sections 372.83, 372.021 and other related acts of the Florida legislature "to be in aid of and not inconsistent with the Rules and Regulations of the Game and Fresh Water Fish Commission and the same are hereby specifically adopted and confirmed both as Rules and Regulations of the Game and Fresh Water Fish Commission and valid and constitutional statutory enactments of the Legislature of the State of Florida."

THE QUESTION IS SUBSTANTIAL

The question is substantial because the Federal Black Bass Act is an important conservation measure the operation and effect of which would, under the decision below, be nullified in a large number of the states. The Act was originally passed in 1926 because State conservation laws regulating bass were being flouted by commercial shippers who were immune when their shipments crossed state lines. Since then, the coverage of the Act has been enlarged to include all game species, as well as commercial fish. The decision below would largely void the operation of the Act in this latter area since regulation of fresh water fish resources is vested, in a majority of the states, in Commissions. According to Bulletin No. 26 issued by the Sport Fishing Institute in January 1954, full regulatory authority is vested in twenty-eight states in Commissions. In twelve states, commissions share the responsibility with legislatures. Only six states currently reserve full regulatory authority to the legislature alone.[3] Should the District Court's interpretation of Section 2 of the Bass Act stand, enforcement of that statute would thus be nullified in the greater part of the country and its purpose of aiding the states in the implementation of their conservation programs (as well as furthering the national program) would be largely frustrated.[4]

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[3] As to the other two, one state vests authority entirely in an administrative official, though exercised in practice in close cooperation with the commission; in the other the authority is divided between the administrative official and the legislature (the commission is advisory only in this state).

1. The narrow interpretation placed by the district court on the term "law of the State" appearing in the federal Act, which excludes administrative regulations from its purview, is clearly erroneous, particularly in view of the status of the regulations of the Florida Game and Fresh Water Fish Commission under Florida law. In that state the regulations of the Commission are expressly made binding law, and should, therefore, certainly be considered as the "law of the State" within the purview of the federal Act.

a. The Florida constitutional amendment provides:

> * * * the * * * regulation of * * * fresh water fish of the State of Flor-

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[4] The decision below would also affect other conservation measures. 18 U. S. C. 43 penalizes the transportation or importation of wild animals or birds or their carcasses, in violation of state, national or foreign laws. Under the reasoning of the court below, the rules of states regulating such resources by commissions, would not be within the protection of the federal statute. By the same reasoning, the regulations of the Secretary of the Interior with respect to the hunting, possession, sale, purchase or transportation of migratory birds, as authorized by 16 U. S. C. 704, would not be considered "laws" the violation of which would be punishable under 18 U. S. C. 43.

> ida * * * shall be vested in a Commission to be known as the Game and Fresh Water Fish Commission. * * * Among the powers granted to the Commission * * * shall be the power to * * * regulate the manner * * * of taking, transporting, storing and using * * * fresh water fish, reptiles, and amphibians. * * * The Legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment, and all existing laws inconsistent herewith shall no longer remain in force and effect.

As noted above (*supra,* p. 5), two state statutes support this grant of authority: 14 F. S. A., Section 372.021, "empowers" the Commission to exercise the powers granted it by the Constitution and prescribes methods for promulgation of its regulations, and 14 F. S. A., Section 372.83, provides that violation of the regulations constitutes a misdemeanor.

The Supreme Court of Florida, whose decisions on this issue are finally authoritative for Florida,[5] has consistently held that the Commission's power to regulate game and fresh water fish is supreme and that its regulations are the law of Florida.

Thus in *Bronson* v. *State of Florida,* decided January 6, 1956, 83 So. 2d 849, the Supreme Court of Florida rejected the contention that a conservation agent of the Game and Fresh Water Fish Commission lacked power to arrest on the ground of an alleged absence of probable cause to believe that a law of the state, as distinguished from a regulation of the Commission, was being violated. The information had charged Bronson with resisting the agent when he attempted to place him in custody for violating in the officer's presence the *laws* of the state "as fixed by the * * * Game and Fresh Water Fish Commission * * * regulating the manner and method of taking reptiles * * *" (emphasis added). The court reaffirmed its earlier pronouncements that the regulations, in their relationship to conflicting statutes on the subject, constituted the "governing law".

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[5] See *Geer* v. *Connecticut*, 161 U. S. 519, 522; *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223, 236; *Nashville, C. and St. L. Ry.* v. *Browning*, 310 U. S. 362, 369.

To the same effect are decisions holding that, in areas within the jurisdiction of the Commission, the Legislature's power to regulate is reduced to an auxiliary one, valid only when consistent with the Commission's regulations, *e. g., Beck* v. *Game and Fresh Water Fish Commission,* 160 Fla. 1, 33 So. 2d 594, holding that statutes which declared certain waters to be in fact salt (thereby removing them from the jurisdiction of the Game and Fresh Water Fish Commission and placing them under the State Board of Conservation) were void as violative of the constitutional provisions creating the Commission. See also *Griffin* v. *Sullivan*, 158 Fla. 870, 30 S. 2d 919; *Price* v. *City of St. Petersburg*, 158 Fla. 705, 29 So. 2d 753; *Bell* v. *Vaughn*, 155 Fla. 551, 21 So. 2d 31.

In *Sylvester* v. *Tyndall*, 154 Fla. 663, 18 So. 2d 892, the court noted that it could be held that the constitutional amendment itself authorized the Commission to adopt rules and regulations to effect the purposes of the amendment, and that the statute which implemented the amendment, in accordance with the amendment's direction, *viz.*, Chapter 21945, Acts of 1943, formerly 14 F. S. A. 372.82, now 14 F. S. A. 372.021, was likewise constitutionally valid. The court spoke of Florida's sovereign right and duty in the matter of game and fish conservation, and took judicial notice of the historical background of the constitutional amendment—"the many years in which the legislature had tried in vain to adequately deal with the subject matter of this amendment by local or special acts * * *, and the conviction finally arrived at by the legislature and the people that this matter of game and fish conservation and regulation was a statewide problem and one that could only be properly solved by a long range program to be carried into effect by a State Commission—a new administrative department of the State Government—equipped with powers adequate to the purpose for which it was to be, and was, created."

In summary, these decisions hold that under the Florida Constitution the sole authority for regulation of fresh water fish in Florida is in the Fresh Water Fish Commission; that this constitutional grant is supported, if such be necessary, by the statute which again states that the Commission may exercise the powers granted it by the Constitution; and that the regulations are given sanction by the statute which penalizes violations. The absolute supremacy and sole authority of the Commission's regulations is affirmed without dissent. The State of Florida took from the legislature the power to regulate this segment of the state's natural resources, and placed it in the Commission as it undoubtedly had power to do. If Florida's power over this subject matter is not to be wholly lost, it must be found in the regulations of the Commission. Its regulations are the law of Florida in this field.

b. Even without the special force which the Florida Constitution confers on its Commission, the regulations issued by a state commission pursuant to authority conferred upon it by a legislature have, under well-established principles, the force and effect of law.

It has been held that the expression "Federal law" generally includes any regulation promulgated by lawful authority, in addition to federal statutes. *Roumanian American Winery, Inc.* v. *Morgenthau,* 152 F. 2d 452, 453 (C. A. 2). Similarly, the Florida courts have held, in general, that the rules of an administrative agency made under power conferred by statute have the force and effect of law. *Florida Livestock Board* v. *Gladden*, Supreme Court of Florida, 76 So. 2d 291; *In re Briley Estate,* 155 Fla. 798, 21 So. 2d 595. The principle is, of course, well established in the decisions of this Court. *Lilly* v. *Grand Trunk R. Co.,* 317 U. S. 481, 488; *Atchison, T. & S. F. Ry. Co.* v. *Scarlett,* 300 U. S. 471, 474, rehearing denied, 301 U. S. 712. Exceptions from the principle must find justification in the special purpose or scope of the enactment using the term "law." Cf. *Phillips* v. *United States,* 312 U. S. 246 ("statute"). No such limitation has been, or can be, suggested here. See *infra,* pp. 12–16.

A regulation issued pursuant to constitutional authority is of even greater dignity than a regulation issued under a legislative enactment. Hence, the decision of the district court excluding from the term "law of the State," as used in the Black Bass Act, administrative regulations made pursuant to state constitutional provisions, is contrary to accepted principles for reading statutes.

2. When the Federal Black Bass Act is considered in the light of its manifest purpose, as revealed in its legislative history, the validity of interpreting the term "law of the State" to include regulations of state commissions becomes even clearer.

The original Act of 1926 was limited to black bass. Both the Senate and House Reports accompanying the bill stated:[6]

> It will strengthen the laws of any State wherein the taking of bass commercially is prohibited. In some States, where such law is now on the statute books, its effect is nullified by the fact that black bass are shipped out of the State in barrels, with rough fish at the top and bottom and the bass in between.
>
> A State which, for conservation purposes, denies for a limited period the sale of black bass to its own citizens frequently finds that its State enactments are nullified by bass being taken from the waters of its own State, where its commercial use is prohibited to its own citizens, and transported from that State and sold to the citizens of another State; thus destroying the State conservation program and giving to the citizens of another State the benefit of commercial consumption which is denied its own citizens.

A letter accompanying the committee reports on this bill, addressed to the Secretary of Commerce by the Commissioner of the Federal Bureau of Fisheries, and forwarded by the Secretary to the Committee, states:

> In such boundary waters as the Potomac River it has been especially difficult for

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[6] S. Rep. No. 612, 69th Congress, 1st Sess. (1926), and H. Rep. No. 31, 69th Congress, 1st Sess. (1925).

> the State authorities to control the situation. During the winter months when the bass are congregated together in the deeper waters in a more or less dormant condition it is not difficult for the fishermen to seine these fishes in such quantities as to seriously deplete the supply. If, as provided by the terms of this bill, their shipment out of States in which their sale is illegal is prohibited, better control over the natural supply will be possible.

Both reports mentioned also that the Act was modeled after the Lacey Act, originally passed in 1900, 31 Stat. 187, 188, which prohibited transportation of birds and animals killed or shipped in violation of the laws of the state in which they were killed or from which they were shipped.

Following an amendment in 1930 to provide adequate machinery for enforcement (46 Stat. 845, S. Rep. No. 75, 71st Cong., 2d Sess.; H. Rep. No. 1610, 71st Cong., 2d Sess. (1930)), the Black Bass Act was amended again in 1947, 61 Stat. 517, to make its provisions applicable to all game fish. ~~The~~ basic purpose was reiterated in the reports accompanying the Bill:

> The bill is intended to supplement State laws applying to protection of game fish. * * * State laws become ineffectual when fish taken in violation of the law cross the State line. If we are to protect game fish, an important natural resource, the Fed-

> eral Government must collaborate in the enforcement of protective laws and regulations at the point where State jurisdiction ends.[7]

A letter from the Under Secretary of the Interior accompanying the reports again noted that existing legislation (the Lacey Act) made unlawful the interstate transportation of wild animals and birds taken contrary to state laws, and that the only legislation with respect to game fish covered only one species, namely, black bass.

In 1952, the Act was again amended to extend its provisions to commercial as well as game fish. 66 Stat. 736; see H. Rep. 2148, 82nd Cong., 2d Sess. (1952).

Thus the history of the Federal Black Bass Act conclusively shows that it was designed to buttress the lawmaking power of the states with respect to forbidden types of commercial use of their fish resources, at the point where such state power was weak. There is no concern evident in such history—nor could there logically be—with the question whether such state power was directly exercised by statute, or through administrative regulations based on statutes.

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[7] S. Rep. No. 288, 80th Cong., 1st Sess.; H. Rep. 986, 80th Cong., 1st Sess. (1947). At this time the phrase "or is contrary to other applicable law" was added to make the provisions of the act operative to fish transported in violation of laws governing national parks and Indian reservations.

Whatever might be said of the intent of Congress when it used the words "law of the State" in 1926, before the development of administrative regulation in this conservation field, by the time of the amendments in 1947 and 1952 Congress was aware that the "law" of many states was in the form of regulations. Both the Senate and House reports on the 1947 amendment stated that "the Federal Government must collaborate in the enforcement of protective *laws and regulations* at the point where state jurisdiction ends [emphasis added]." Yet in both the later amendments Congress again used the generic term "law" when, had it wished to limit its meaning to statutes, it could easily have said so.

Congress manifestly intended the federal statute to aid the exercise of state authority in this field, whether it took the form of a statute or a regulation having the force of law. Statutes are to be given a reasonable interpretation in relation to their purpose. *United States* v. *American Trucking Association,* 310 U. S. 534, 543. The purpose of this statute to prevent evasion of state (and thus national) programs for conservation of game fish by out-of-state shipment on the part of commercial fisheries such as appellee should not be frustrated by the narrow and unreasonable interpretation given the words "law of the State" by the district court.

CONCLUSION

It is respectfully submitted that this Court should take jurisdiction of this appeal since the District Court's interpretation of the statute is clearly erroneous and the question presented is substantial. Indeed, we submit that the decision is so clearly erroneous that the Court might well see fit to reverse the decision below on the basis of this Jurisdictional Statement, without oral argument.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

MARCH 1956.

APPENDIX A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, OLANDO DIVISION

UNITED STATES OF AMERICA *vs.* LUDENIA HOWARD, trading as Stokes Fish Company, Case No. 910 Orl. Cr.

ORDER ON MOTION TO QUASH INFORMATION

This causing coming on for hearing upon Defendant's Motion to Quash Information, and the same having been argued by counsel, and it being called to the Court's attention that there is no law of the State of Florida prohibiting the transportation of the fish described in the said Information, and the Court taking judicial notice that there is no such law; but the only prohibition against the same being the rules of the State Game and Fresh Water Fish Commission; and it being the further opinion of the Court that the rules and regulations of the said Game and Fresh Water Fish Commission do not constitute the law of the State of Florida as described by and contemplated in Section 852, Title 16, United States Code, which violation was specifically charged in the Information filed herein; it is, therefore

ORDERED, ADJUDGED and **DECREED** that the said Information be, and the same is hereby quashed, and the Defendant discharged.

DONE and ORDERED in Chambers at Orlando, Florida, this 29th day of December, A. D., 1955.

WILLIAM J. BARKER,
As Judge of the above court.

APPENDIX B

The Federal Black Bass Act of May 20, 1926, c. 346, Sections 2 and 7, 44 Stat. 576, as amended, 46 Stat. 845, 61 Stat. 517, 66 Stat. 736, provides:

> Section 2. It shall be unlawful for any person to deliver or knowingly receive for transportation, or knowingly to transport, by any means whatsoever, from any State, Territory, or the District of Columbia, to or through any other State, Territory, or the District of Columbia, or to or through any foreign country, any black bass or other fish, if (1) such transportation is contrary to the law of the State, Territory, or the District of Columbia from which such black bass or other fish is or is to be transported, or is contrary to other applicable law, or (2) such black bass or other fish has been either caught, killed, taken, sold, purchased, possessed, or transported, at any time, contrary to the law of the State, Territory, or the District of Columbia in which it was caught, killed, taken, sold, purchased, or possessed, or from which it was transported or contrary to other applicable law; and no person shall knowingly purchase or receive any such black bass or other fish which has been transported in violation of the provisions of this Act; nor shall any person receiving any shipment of black bass or other fish transported in interstate commerce make any false record or render a false account of the contents of such shipment.

Section 7. In addition to any forfeiture herein provided, any person who shall violate any of the provisions of this Act shall, upon conviction thereof, be punished by a fine of not exceeding $200, or imprisonment for a term of not more than three months, or by both such fine and imprisonment, in the discretion of the court.

Article IV, Section 30, of the Constitution of Florida, provides in pertinent part:

> § 30. *Game and fresh water fish commission; term; compensation; powers; director; state game fund.*
>
> 1. From and after January 1, 1943, the management, restoration, conservation and regulation of the birds, game, fur bearing animals, and fresh water fish of the State of Florida, and the acquisition, establishment, control and management, of hatcheries, sanctuaries, refuges, reservations, and all other property now or hereafter owned or used for such purposes by the State of Florida, shall be vested in a Commission to be known as the Game and Fresh Water Fish Commission. Such Commission shall consist of five members, one from each congressional district, as existing on January 1, 1941, who shall be appointed by the Governor, subject to confirmation by the Senate. The members so appointed shall annually select one of their members as Chairman of the Commission.
>
> * * * * *
>
> 4. Among the powers granted to the Commission by this Section shall be the power to fix bag limits and to fix open and closed seasons, on a state-wide, regional or

> local basis, as it may find to be appropriate, and to regulate the manner and method of taking, transporting, storing and using birds, game, fur bearing animals, fresh water fish, reptiles, and amphibians. The Commission shall also have the power to acquire by purchase, gift, all property necessary, useful, or convenient, for the use of the Commission in the exercise of its powers hereunder.
>
> * * * * *
>
> 7. The Legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment, and all existing laws inconsistent herewith shall no longer remain in force and effect. All laws fixing penalties for the violation of the provisions of this amendment and all laws imposing license taxes, shall be enacted by the Legislature from time to time. [Added, general election, 1942.]

14 Florida Statutes Annotated, Section 372.021, Laws 1943, c. 21945, Sections 4 and 5 provide in pertinent part:

> The game and fresh water fish commission may exercise the powers, duties and authority granted by § 30, article IV, of the constitution of Florida, by the adoption of rules, regulations and orders, or otherwise in its discretion, which said rules, regulations and orders shall be promulgated in the manner following:
>
> (1) All general codes of rules, regulations and orders, and all revisions thereof and amendments and additions thereto, of state-wide application, made and adopted by the commission shall be promulgated by the director of the commission, by filing a certified copy thereof in the office of the

secretary of state of this state and a certified copy thereof in the office of each county judge of this state, and by the publication of a notice one time in each of the congressional districts of the State of Florida in a newspaper published in and having general circulation in such district, notifying and advising the people of the State of Florida such code of rules, regulations and orders, or revisions, amendments or additions thereto, have been made and adopted by the commission and a certified copy thereof is on file in the office of the secretary of state and also in the office of each county judge in the state, and a copy thereof may be obtained from the commission at its office in the City of Tallahassee, Florida.

(2) Such general code of rules, regulations and orders, and all revisions, amendments and additions thereto, shall become effective thirty days after the filing of a certified copy in the office of the secretary of state.

(3) All rules, regulations and orders, and all revisions thereof and amendments and additions thereto, of less than statewide application, made and adopted by the commission, shall be filed in the office of the secretary of state and notice thereof shall be published by the director of the commission, one time in a newspaper of general circulation published in the area or areas affected by such rule or regulation, within ten days from the date of the adoption thereof. Such rules, regulations and orders, and all revisions thereof and amendments and additions thereto shall become effective twenty days after being

filed in the office of the secretary of state, and by publication as aforesaid the director of game and fresh water fish commission shall give notice such rules and regulations, and revisions thereof and amendments and additions thereto, have been adopted and may be obtained by all interested persons from the county judges of the counties within the areas affected, or from the office of the commission in Tallahassee, Florida.

(4) A copy of all rules, regulations and orders and codes of rules, regulations and orders, and all revisions, amendments and additions thereto, whether of state-wide or limited application, shall be certified by the director of game and fresh water fish commission and shall be filed with the secretary of state within ten days after the adoption thereof, and in addition thereto, the said director shall, within the said ten-day period, file in the office of each county judge of this state a true and correct copy of all rules, regulations and orders and all revisions, amendments and additions thereto. A copy of said rules, regulations and orders, and revisions, amendments and additions thereto, or any portion or portions thereof, certified by the secretary of state under the great seal of the State of Florida, or by the director of the game and fresh water fish commission under the seal of the commission, shall be received as evidence in all courts of this state without further authentication; provided, nothing herein shall be construed as preventing or prohibiting the courts from taking judicial knowledge thereof.

(5) The provisions of subsections (1), (3) and (4) relating to promulgation and filing are directory and not mandatory.

14 Florida Statutes Annotated, Section 372.83, Laws 1943, c. 21945, Section 6, as amended, provides:

> Any person violating any rule, regulation or order of the game and fresh water fish commission adopted pursuant to § 30, article IV, of the constitution of this state and this chapter shall be guilty of a misdemeanor.

Rule 14.01 of the Rules and Regulations of the Game and Fresh Water Fish Commission of Florida provides:

> No person or persons shall sell, attempt to sell, offer for sale, barter, purchase, offer to purchase, attempt to purchase, or exchange for merchandise or transport, transport for sale, or transport out of the State of Florida any large or small mouth black bass, speckled perch, jack, shell cracker, warmouth perch, red breast, pike, stump knocker, sun fish, or Canadian sunfish, or any other species of bream; provided, that holders of valid fishing licenses may carry out of the State or transport as personal baggage their legal bag limit thereof; and provided further that the Director may issue permits for transportation of black bass, speckled perch, jack, bream, shell cracker, warmouth perch, red breast, pike, stump knocker, or any other species of bream within or out of the State of Florida for propagation or scientific purposes only. No common carrier shall knowingly transport or receive for transportation within the State of Florida any black bass, speckled perch, jack, bream, shell cracker, warmouth perch, red breast, pike, stump knocker, or any other species

of bream. It is the intention of this Rule to prohibit within the limits of the State of Florida the sale, transportation and/or shipment of any species of fresh water game fish indigenous to the waters of the State of Florida, as well as other fresh water game fish the sale or offering for sale of which would impede or interfere with the enforcement of the Rules and Regulations of the Commission with respect to the taking, possession and the sale of fresh water game fish of the same or apparently the same species, whether such fresh water game fish were caught from the waters within the State of Florida or elsewhere, except as otherwise provided in the Rules.

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No. [illegible]

In the Supreme Court of the United States

October Term, 1956

United States of America, Appellant

v.

[illegible] Howard, [illegible] Co.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF [illegible]

[illegible]

[illegible]

Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 52

UNITED STATES OF AMERICA, APPELLANT

v.

LUDENIA HOWARD, TRADING AS STOKES FISH CO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the District Court (R. 3) quashing the information has not been reported.

JURISDICTION

On December 29, 1955 the District Court entered an order quashing the information and discharging defendant on the ground that the information did not charge an offense under the Federal Black Bass Act, as amended (R. 3). A notice of appeal to this Court was filed in the District Court on January 27, 1956 (R. 4, 5), and this Court noted probable jurisdiction on June 11, 1956 (R. 5). Jurisdiction of this Court to review on direct appeal the decision of the District Court, quashing the information on the ground that it did not charge a crime within the meaning of the statute on which it was founded, is conferred by 18 U. S. C. 3731.

QUESTION PRESENTED

Whether the District Court erred in construing the term "law of the State," as used in the Federal Black Bass Act (which prohibits interstate transportation of black bass and other fish if such transportation is contrary to the law of the state from which the fish is transported), not to include regulations issued by the Florida Game and Fresh Water Fish Commission, where (1) the Commission was created by a Florida constitutional amendment which vested it with sole authority to regulate transportation of fresh water fish in Florida and (2) the constitutional amendment provided that the legislature could pass laws in aid of the provisions of the amendment but not inconsistent therewith.

FEDERAL STATUTES AND STATE CONSTITUTION, STATUTES, AND REGULATIONS INVOLVED

The pertinent provisions of 18 U. S. C. 3731 and the federal act to regulate the interstate transportation of fish, the so-called Black Bass Act of May 20, 1926, as amended, c. 346, 44 Stat. 576, 46 Stat. 845, 61 Stat. 517, 66 Stat. 736, 16 U. S. C. 851 to 854 are set out in Appendix A, *infra,* pp. 39–42.

The applicable provisions of the constitution of Florida, Florida statutes, and the regulations of the Florida State Game and Fresh Water Fish Commission are set forth in Appendix B, *infra,* pp. 43–50.

Federal statutes analogous to the Black Bass Act are the acts which regulate the interstate transportation of wild animals or birds, Act of June 25, 1948, c. 645, 62 Stat. 687, 18 U. S. C. 43, 44 and the Act of July 3, 1918, c. 128, Section 4, 40 Stat. 755, 49 Stat. 1556, 53 Stat. 1433, 16 U. S. C. 705. Pertinent sections of these statutes are set forth in Appendix C, *infra*, pp. 51–53.

STATEMENT

In the United States District Court for the Southern District of Florida, a criminal information was filed against appellee on July 20, 1955 (R. 1, 2), charging that on or about May 16, 1955 at Sanford, Seminole County, Florida, in the Southern District of Florida, "Ludenia Howard, trading as Stokes Fish Co., delivered to the Railway Express Agency, Inc., for transportation from Sanford, in the State of Florida, to Macon, in the State of Georgia, 150 pounds of fresh water bream, fresh water crappie, and fresh water black bass, and such transportation was then and there contrary to the laws of the State of Florida; in violation of Section 852, Title 16, United States Code." The cited statute, originally known as the Federal Black Bass Act, though it has been amended to apply to all fish, *infra*, pp. 39–42, makes it an offense for any person (including any company, partnership or corporation) knowingly to transport, or to deliver for transportation in interstate or foreign commerce, any black bass or other fish, if such transportation is contrary to the law of the state from which the fish is or is to be transported. Sections 1, 2, and 7, Act of May 20, 1926, as amended, Appendix A, *infra,* pp. 39–42.[1]

Appellee moved to quash the information on the grounds that it failed to allege that she personally delivered the fish for transportation or had any personal connection with the transaction in any way, or that she had any knowledge of the nature of the shipment or any knowledge of the transaction. The motion also included the standard averment that the information failed to state a cause of action against appellee (R. 2).

The District Court quashed the information on the ground that there is no law of the State of Florida prohibiting the transportation of the fish described in the information, "the only prohibition against the same being the rules of the State Game and Fresh Water Fish Commission; and it being the further opinion of the Court that the rules and regulations of the said Game and Fresh Water Fish Commission do not constitute the law of the State of Florida as described by and contemplated in section 852, Title 16, United States Code * * *" (R. 3).

The Game and Fresh Water Fish Commission of Florida was created in 1942 by a constitutional amendment (Article IV, Section 30, Constitution of Florida), *infra,* pp. 43–44, which provides that "from and after January 1, 1943, the management, restoration, conservation and regulation of the birds, game, fur bearing animals, and fresh water fish of the State of Florida, and the acquisition, establishment, control and management, of hatcheries, sanctuaries, refuges, reservations, and all other property now or hereafter owned or used for such purposes by the State of Florida, shall be vested in [the] Commission * * *". The Amendment gave the Commission "power to fix bag limits and to fix open and closed seasons, on a statewide, regional or local basis, as it may find to be appropriate, and to regulate the manner and method of taking, transporting, storing and using birds, game, fur bearing animals, fresh water fish, reptiles, and amphibians". The Amendment also provided that "The Legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment, and all existing laws inconsistent herewith shall no longer remain in force and effect. All laws fixing penalties for the violation of the provisions of this amendment and all laws imposing license taxes, shall be enacted by the Legislature from time to time."

---

[1] Section 2 of the Act also forbids the transportation or delivery for transportation if the fish has been either "caught, killed, taken, sold, purchased, possessed, or transported, at any time, contrary to the law of the State * * *."

In accordance with these latter provisions for setting of penalties and license taxes, Section 372.83 of the Florida Statutes Annotated (Laws 1943, c. 21945, Section 6, as amended, *infra*, p. 46) makes it a misdemeanor to violate "any rule, regulation or order of the game and fresh water fish commission adopted pursuant to § 30, article 4, of the constitution of this state." Likewise, Section 372.65 of the Florida Statutes Annotated (Laws 1929, c. 13644, § 31, as amended, *infra*, pp. 46–47) sets license fees for fresh water fish dealers and provides that application for such shall be made to the commission of game and fresh water fish. Sections 372.68 and 372.69 (Laws 1929, c. 13644, § 63, and § 22, as amended, *infra,* pp. 47–48) provide for monthly reports by fresh water fish dealers on the amounts of fish sold, which reports must be made on forms furnished by the commission.

Implementing the constitutional amendment, Section 372.021 of the Florida Statutes Annotated (Laws 1943, c. 21945, Sections 4 and 5), *infra,* pp. 44–46, authorizes the Game and Fresh Water Fish Commission to exercise "the powers, duties and authority granted by Section 30, article IV, of the constitution of Florida, by the adoption of rules, regulations and orders," and prescribes the procedure for promulgation of the Rules.

On July 19, 1954, the Commission by formal resolution determined the Sections of the Florida Statutes mentioned in the preceding two paragraphs (*viz.,* Sections 372.83, 372.65, 372.68, 372.69 and 372.021), as well as several other related acts of the Florida legislature, "to be in aid of and not inconsistent with the Rules and Regulations of the Game and Fresh Water Fish Commission and the same are hereby specifically adopted and confirmed both as Rules and Regulations of the Game and Fresh Water Fish Commission and valid and constitutional statutory enactments of the Legislature of the State of Florida."

Pursuant to the constitutional amendment's provision that the Legislature "may enact any laws in aid of, but not inconsistent with, the provisions of this amendment," and that "all existing laws inconsistent herewith shall no longer remain in force and effect," the Legislature in 1951 repealed various statutes which had regulated the seasons, methods of catching, and bag limits of black bass, as well as the statute (Section 372.29, Florida Statutes Annotated, Laws 1929, c. 13644, Section 35) which had prohibited the sale or transportation of black bass out of Florida. These matters are now covered by the Rules of the Game and Fresh Water Fish Commission. Thus, Rule 14.01 of the Commission's Rules and Regulations, *infra,* pp. 48–49, now prohibits, except as therein otherwise provided, the transportation of black bass and other species of fresh water fish out of Florida.

SUMMARY OF ARGUMENT

I

The decision of the District Court rested on the sole ground that the regulations of the Florida Fresh Water Fish Commission do not constitute the "law of the State" within the meaning of the Federal Black Bass Act, prohibiting the transportation of fish in interstate commerce if such transportation is contrary to the law of the state. Hence, an appeal was properly taken to this Court under 18 U. S. C. 3731. The fact that appellee, in her motion to quash, also attacked the indictment on other grounds is immaterial. The ground of decision of the District Court is determinative as to the right of appeal to this Court. *United States* v. *Carroll,* 345 U. S. 457, 459, footnote.

II

A. The term "law of the State" as used in the Black Bass Act—forbidding transportation of fish in interstate commerce if such transportation is contrary to the law of the state where the shipment originates—means whatever law the state properly considers binding on persons within the state. That is its ordinary meaning; for fifty years prior to the enactment of the Black Bass Act in 1926, this Court had consistently interpreted "law of the state" to include any "enactment, from whatever source originating, to which a State gives the force of law" (*Williams* v. *Bruffy,* 96 U. S. 176, 183), and the courts have almost uniformly treated a valid regulation as "law."

B. The regulations of the Florida Fish Commission are binding law in Florida with respect to the transportation of fresh water fish. Authority to promulgate regulations which will have the force of law is conferred on the Commission and taken away from the legislature by the Florida constitution. This grant of authority has been implemented by legislation authorizing the Commission to exercise its powers and punishing violations of the regulations. The Supreme Court of Florida, which has final authority in interpreting the law of Florida, has declared that the regulations of the Commission are the law of Florida. E. g., *Bronson* v. *Florida,* 83 So. 2d 849.

Even without the special force of the Florida constitution in conferring power on the Commission, the regulations, issued by a state commission pursuant to authority conferred upon it by the legislature and implemented by punitive legislation passed by the legislature, would be the "law of the state." Indeed, since the Florida legislature has passed a law making the violation of the regulations a crime, there is a "law of the state" forbidding the transportation, even on the District Court's narrow theory that a "law" must be one enacted by the state legislature.

III.

That the phrase "law of the State", as used in the Black Bass Act, includes laws issued by state conservation commissions acting under proper authority becomes even clearer when the federal statute is considered in full context, in relation to its place in the federal conservation program, and in the light of its legislative history. The Act is on its face designed to strengthen state control in the area where state control must necessarily be weakest, *i. e.* interstate activity. The fact that other conservation legislation follows the same pattern likewise shows that such was its purpose. And the legislative history both of the original act of 1926, which was limited to black bass, and of the 1947 and 1952 amendments, which extended it to all fish, confirms this objective. There is nothing in the language of the Act to suggest that it was designed to aid only the comparatively few states which operate their conservation program through action by the legislature alone, without delegation of authority to various commissions. Rather, it is clear that the statute was designed to aid the conservation programs of all the states, no matter how those programs are promulgated or administered.

This manifest purpose would be all but nullified under the narrow construction of the District Court. Available studies indicate that in only six states is full regulatory authority over fish exercised solely by statute. What is termed "full" regulatory authority is vested in 28 states in commissions. Twelve states divide responsibility between legislature and commission. Thus, the aim of the Act to buttress the states' conservation programs would be very largely defeated under the lower court's interpretation of "law of the state."

IV

No lack of due process results from recognition of the Florida Commission's Rules as the law of Florida. Appellee's complaint that the rules may fluctuate arbitrarily, and are difficult of ascertainment, does not go to the only question here involved—whether any regulations of a state commission can ever be the law of the state within the purview of the federal statute—and therefore is not properly raised at this time.

The contention is, in any event, without merit in this case. The rule forbidding transportation of black bass has been in effect since the founding of the Florida Commission. Before that, such transportation was forbidden by Florida statute since 1927. Thus, there has been, in fact, no "vacillating rule". And were the rule to be changed, there is elaborate machinery provided for effective notice to the public, notice which is probably considerably more effective than that used in promulgation of statutes.

Moreover, it is evident from the amounts charged in this information that appellee is a commercial dealer in fish. As such, she was required to be licensed. The form of license carries the legend that no black bass is permitted to be on the premises where such business is conducted. The license also states that a holder engaged in the taking of fish must hold a valid fishing license. Section 372.69 of the Florida statutes requires that fishing licenses shall contain on the back thereof a synopsis of the fresh water fishing laws of the state. In short, no one interested in obeying the law would have any difficulty in discovering the applicable regulations.

ARGUMENT

I. SINCE THE DISTRICT COURT BASED ITS DECISION SOLELY ON A CONSTRUCTION OF THE STATUTE, THE APPEAL IS PROPERLY WITHIN THE JURISDICTION OF THIS COURT

As the order of the District Court shows (R. 3), that court announced, as its sole reason for dismissing the information, that the Rules of the Game and Fresh Water Fish Commission of the State of Florida "do not constitute the law of the State of Florida as described by and contemplated in Section 852, Title 16, United States Code * * *" (prohibiting transportation of fish in interstate commerce, if such transportation is contrary to the law of the state). Despite this fact, appellee, in her motion to dismiss or affirm, challenged the jurisdiction of this Court to consider the District Court's ruling on the ground that her motion to dismiss in the District Court had raised other issues, such as the sufficiency of the indictment as a pleading, which she claims would also support the judgment of dismissal (Motion, pp. 15–16).

18 U. S. C. 3731 (Appendix A, *infra*, p. 39) authorizes an appeal to this Court when the "decision or judgment" is based on a construction (or the validity) of the statute upon which the information is found. It is the ground of decision of the District Court, not the defendant's motion, which is determinative. *United States* v. *Carroll,* 345 U. S. 457, at 459, footnote; *United States* v. *Gilliland,* 312 U. S. 86, 89; *United States* v. *Borden Co.,* 308 U. S. 188. Were it otherwise, every case in which there was pleaded, in the motion to dismiss, any issue other than the construction or validity of the statute would be effectively barred from direct review under 18 U. S. C. 3731, even though the decision was based solely on construction or validity. It is obvious that this would negate the purpose and effect of the direct-appeal statute, as construed by this Court.[2]

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[2] A different situation, not here involved, is presented when the grounds for the judgment of the District Court are not clear or where the decision of the District Court is based on several grounds, only one of which affords a basis for direct review, *United States* v. *Swift & Co.*, 318 U. S. 442; *United States* v. *Wayne Pump Co.*, 317 U. S. 200.

II. THE REGULATIONS OF THE CONSTITUTIONALLY-CREATED FLORIDA COMMISSION ARE BINDING LAW IN FLORIDA, AND THEY THEREFORE CONSTITUTE THE "LAW OF THE STATE" WITHIN THE PURVIEW OF THE FEDERAL BLACK BASS ACT

Section 2 of the Black Bass Act, 16 U. S. C. 852, (Appendix A, *infra*, pp. 39–40), prohibits the transportation in interstate commerce of fish, if such transportation is "contrary to the law of the State" from which the fish is to be transported. By every pertinent consideration of legislative construction—plain meaning, evident purpose, legislative history, judicial construction—it seems manifest that "law of the State" means whatever law the state properly considers binding on persons within the state. In relation to fresh water fish, the law binding on persons in Florida is, as we show below, the regulation issued by Florida's constitutionally-created Game and Fresh Water Fish Commission. Its regulations are therefore the "law of the State" within the scope of the Black Bass Act.

A. PROVISIONS CONSIDERED BY THE STATE TO BE BINDING ON PERSONS WITHIN ITS JURISDICTION ARE GENERALLY "LAWS OF THE STATE" FOR THE PURPOSES OF FEDERAL LEGISLATION

When a federal statute speaks of the "law of the state", the normal reading of the term would be to construe it as applying to whatever law the state considers binding on persons within that state. "Law of the state" is, on its face, a broader expression than "state statutes" or "enactments of the state legislature". In its ordinary usage, the former term embraces regulations of duly authorized commissions, having the force and effect of law, and certainly covers regulations which, like those here involved, have by the state constitution and state judicial decision been specifically made the law of the state.

1. The decisions of this Court have consistently given this broad construction to the term "law of the state" as used in federal legislation. Almost fifty years before the enactment in 1926 of the Black Bass Act, the Court said in *Williams* v. *Bruffy,* 96 U. S. 176, 183, "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State within the meaning of the clause cited relating to the jurisdiction of this court." There, the "statute" in question was a law passed by the Confederate States vesting in the Confederation all property of alien enemies. This law was given force and effect in Virginia, and Bruffy's administrator successfully defended against a suit on a pre-war contract on the ground that the money owed had been paid under this law to the Confederation. This Court held that, while the organization of the Confederate States had no legal existence, yet its enactment was possessed of whatever efficacy was given it by the individual confederate states, and was thus a statute within the law (now 28 U. S. C. 1257 (2)) conferring jurisdiction on the Supreme Court where the validity of a state statute was challenged as repugnant to the Constitution.

On several occasions thereafter, before the use of the phrase "law of the state" by Congress in the Black Bass Act, the Court construed it as used in the Constitution and in the Acts of Congress granting jurisdiction to this Court. In 1911, in *Grand Trunk Ry.* v. *Indiana R. R. Comm.*, 221 U. S. 400, 403, the Court held: "Observing first, that the order [of the State railroad commission] is a legislative act by an instrumentality of the State exercising delegated authority (*Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226), is of the same force as if made by the legislature, and so is a law of the State within the meaning of the contract clause of the Constitution [citing cases], we come to consider whether it does impair the obligation of the contract."

In 1914, *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 660, 661, ruled that "rates made by the General Assembly or administrative orders made by a Commission are both legislative in their nature * * * and any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he had been thereby deprived of a right protected by the Constitution."

In October Term 1918, the Court held in *Lake Erie & W. R. R. Co.* v. *Pub. Util. Comm.*, 249 U. S. 422, 424, that an order of the state public utilities commission, "being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction," and then found that the order was not in contravention of the Fourteenth Amendment. During the same term, the Court held in *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 141, that it was plain that rate fixing orders of the railroad commission were state laws within the meaning of the statute granting appeal to this Court "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

2. In addition to this general principle that the term "law of the state" in a federal statute has a broad scope, there is the well-established corollary that regulations issued by a commission pursuant to authority conferred upon it by the legislature have the force and effect of law. This Court has so held as to federal regulations in numerous cases. E. g., *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 488; *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481, 484; *Columbia System* v. *United States*, 316 U. S. 407, 417, 418; *Atchison, T. & S. F. Ry. Co.* v. *Scarlett*, 300 U. S. 471, 474. Consonant with such decisions, it has been held that the expression "federal law" generally includes any regulation promulgated by lawful authority, in addition to federal statutes. *Roumanian American Winery, Inc.* v. *Morgenthau*, 152 F. 2d 452, 453 (C. A. 2). Exceptions from that principle must find justification in the special purpose or scope of the enactment using the term "law." Cf. *Phillips* v. *United States*, 312 U. S. 246 ("statute"). As we shall show in detail, no such limitation can be suggested here.

Thus, both before and after the Black Bass Act of 1926, there is a history of interpretation of the phrase "law of the state", as used in the Constitution of the United States and in Acts of Congress, which supports its normal meaning as embracing regulations recognized by the state as having the force and effect of law in that jurisdiction.

B. THE REGULATIONS OF THE FLORIDA COMMISSION ARE BINDING LAW IN FLORIDA

1. In Florida, the regulations of the Game and Fresh Water Fish Commission have been expressly made, to the fullest extent of the state's power to do so, the law of Florida. As it undoubtedly had the right to do, Florida has taken from the legislature the power to regulate this area of the state's natural resources. Unless Florida's power over this subject matter be wholly lost, it must be found in the regulations of the Commission. The Commission's regulations are plainly the "law" of that state.

The Florida constitutional amendment provides:

> * * * the * * * regulation of * * * fresh water fish of the State of Florida * * * shall be vested in a Commission to be known as the Game and Fresh Water Fish Commission. * * * Among the powers granted to the Commission * * * shall be the power to * * * regulate the manner * * * of taking, transporting, storing and using * * * fresh-water fish, reptiles, and amphibians. * * * The Legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment, and all existing laws inconsistent herewith shall no longer remain in force and effect.

As noted above (*supra,* pp. 5–7), enactments by the Florida legislature implement this provision. 14 F. S. A. Section 372.021 supports this grant of authority by "empowering" the Commission to exercise the powers granted it by the Constitution, and prescribes methods for promulgation of the Commission's regulations. In accordance with the constitutional provision that laws fixing penalties and imposing license taxes are to be enacted by the legislature, 14 F. S. A. Section 372.83 provides that violation of the regulations constitutes a misdemeanor, and 14 F. S. A. Section 372.65 provides for licensing of fish dealers.

The Supreme Court of Florida has consistently held that the power of the Game and Fresh Water Fish Commission is supreme, and that its regulations are the law of Florida. In *Bronson* v. *Florida,* decided January 6, 1956, 83 So. 2d 849, the State Supreme Court rejected the contention that a conservation agent of the Game and Fresh Water Fish Commission lacked power to arrest on the ground of an alleged absence of probable cause to believe that a law of the State, as distinguished from a regulation of the Commission, was being violated. The information had charged Bronson with resisting the agent when he attempted to place him in custody for violating in the officer's presence the *laws* of the State "as fixed by the * * * Game and Fresh Water Fish Commission * * * regulating the manner and method of taking reptiles. * * *" [Emphasis added.] The court reaffirmed earlier pronouncements that the regulations, in their relationship to conflicting statutes on the subject, constituted the "governing law".

To the same effect are Florida decisions which have held that the constitutional amendment divested the legislature of its law-making power with respect to game and fresh water fish, and placed this power in the Commission, and that in areas within the jurisdiction of the Commission the legislature's power to regulate is reduced to an auxiliary one, valid only when consistent with the Commission's regulations. In *Beck* v. *Game and Fresh Water Fish Commission,* 160 Fla. 1, 33 So. 2d 594, the court held that statutes which declared certain waters to be in fact salt (thereby removing them from the jurisdiction of the Game and Fresh Water Fish Commission and placing them under the State Board of Conservation) were void as violative of the constitutional provisions creating the Commission. In *Griffin* v. *Sullivan,* 158 Fla. 870, 30 S. 2d 919; *Price* v. *City of St. Petersburg,* 158 Fla. 705, 29 So. 2d 753; and *Bell* v. *Vaughn,* 155 Fla. 551, 21 So. 2d 31, the court further discussed the unique vesting of supreme law-making power in the Florida Commission.

Sylvester v. *Tyndall,* 154 Fla. 663, 18 So. 2d 892, reviewed the historical background leading up to the constitutional amendment, taking judicial notice of "the many years in which the legislature had tried in vain to adequately deal with the subject matter of this amendment by local or special acts * * *, and the conviction finally arrived at by the legislature and the people that this matter of game and fish conservation and regulation was a statewide problem and one that could only be properly solved by a long range program to be carried into effect by a State

Commission—a new administrative department of the State Government—equipped with powers adequate to the purpose for which it was to be, and was, created." The court noted that it could be held that the constitutional amendment itself authorized the Commission to adopt rules and regulations to effect the purposes of the amendment, and that the statute which implemented the amendment in accordance with the amendment's direction [*viz.,* Chapter 21945, Acts of 1943, formerly 14 F. S. A. 372.82, now 14 F. S. A. 372.021] was therefore likewise constitutionally valid.

In sum, these decisions hold that under the Florida constitution the authority for regulation of fresh water fish in Florida is in the Fresh Water Fish Commission; that this constitutional grant is supported, if that be necessary, by the state statute which again declares that the Commission may exercise the powers granted it by the constitution; and that the Commission's regulations are given sanction by the statute which penalizes violations. The absolute supremacy and sole authority of the Commission's regulations is affirmed without dissent. On the interpretation of the Florida constitution and Florida law regulating its fish and wildlife, the Florida court is, of course, finally authoritative. See *Geer* v. *Connecticut,* 161 U. S. 519, 522; *West* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, 236; *Nashville, C. and St. L. Ry.* v. *Browning,* 310 U. S. 362, 369.

2. Even without the special force of the Florida constitutional amendment, the Commission's regulations would be the law of the state. The Florida courts follow the general principle (*supra,* p. 16)

that the rules of an administrative agency made under power conferred by statute have the force and effect of law. *Florida Livestock Board* v. *Gladden,* 76 So. 2d 291; *In re Briley Estate,* 155 Fla. 798, 21 So. 2d 595. Moreover, the Florida legislature has implemented the provisions of the Florida constitution relating to the Fish Commission by legislation empowering the Commission to exercise the power conferred upon it by the constitution and by making violations of the legislation a crime. Hence, even without the particular provisions of the constitutional Amendment, the regulations issued by the Commission pursuant to authority conferred by the legislature, and implemented by punitive legislation passed by the legislature, have the force and effect of law.

It follows that even on the theory of the District Court that a "law of the state" prohibiting the transportation of fish, as that term is used in the Black Bass Act, must be a law enacted by the legislature, it was error to dismiss this information. The Florida statute, 14 F. S. A. 372.83, provides: "Any person violating any rule, regulation or order of the game and fresh water fish commission adopted pursuant to Section 30, Art. IV, of the constitution of this state and this chapter shall be guilty of a misdemeanor." The Florida statute thus incorporates by reference Rule 14.01 of the Commission which prohibits the transportation of black bass. Certainly, it cannot be argued that this is not a law of Florida prohibiting transportation of black bass merely because the penalty is contained in the statute, while the express prohibition, which the statute incorporates, is set forth in the regulation of the Commission. By penalizing the violation of the regulation, the statute adopts the regulation and prohibits the violation. The delivery of fish for the transportation alleged in the information was contrary to this statute, and thus contrary to the law of Florida; by the same token, the shipment in interstate commerce was a violation of the federal statute.

III. THE PURPOSE OF THE BLACK BASS ACT REQUIRES THAT "LAW OF THE STATE" BE INTERPRETED AS INCLUDING THE COMMISSION'S RULES

A. THE WORDS AND CONTEXT OF THE ACT REVEAL A PURPOSE TO AID AND SUPPLEMENT STATE CONSERVATION PROGRAMS

16 U. S. C. 852 forbids the transportation of black bass or other fish in interstate commerce if the transportation itself is forbidden by the state from which the bass is or is to be transported, or if it has been caught or killed, sold, bought, taken, possessed or transported at any time contrary to the law of the state in which it was caught, killed, taken, bought, sold or possessed or from which it was transported. 16 U. S. C. 854 provides that nothing in the Act shall be construed to prevent the states and territories from making or enforcing laws or regulations not inconsistent with the Act or from making or enforcing laws or regulations which shall give further protection to black bass and other fish. The statute is thus patently designed to furnish complete support for every conceivable effort by the individual states to regulate their fisheries resources in the area where state control is necessarily weakest, *i. e.,* interstate

activity. There is nothing in the language to suggest that the Act was designed solely to aid the comparatively few states (*infra,* pp. 31–33) still relying only on statutes for their conservation programs. Rather, the breadth of the statute's scope in support of the individual states' programs suggests the opposite—that it was made for all the states.

This conclusion is strengthened by reading the particular section here involved in the context of the whole Act and of the federal conservation program. 16 U. S. C. 852 is one paragraph in an "Act to Regulate Interstate Transportation of Black Bass," which constitutes Chapter 13 of Title 16 of the United States Code (entitled "Conservation"). Administration of the Act is made part of the duties of the Secretary of the Interior, and is effected through the Bureau of Wildlife of that Department. Section 852c authorizes the Secretary, *inter alia,* to make such regulations as he deems necessary to carry out the purposes of Chapter 13. Section 852d provides for enforcement by officers of the Department of Interior by arrests and searches and seizures. The Act is plainly to be administered in aid of state law regulating black bass. This is evident from the language of Section 852 itself as well as Sections 852b and 854, providing for application of state law on arrival in the state and for full power in the states to regulate black bass by "laws or regulations." Congress has thus entrusted the Act to administrative enforcement by an agency long established for similar related purposes, and empowered it to make regulations for the Act's enforcement. In this context it would be strange indeed to say that a federal statute, itself enforced administratively, and designed to mesh with varied state treatment of the subject, meant to recognize as the "law of the state" only statutory enactments.

The whole subject of "Conservation," dealt with in the several chapters of Title 16, reveals the same scheme of implementation of the national program through the Interior Department in cooperation with state commissions. 16 U. S. C. 661 (Act of March 10, 1934, c. 55, Section 1, 48 Stat. 401, as amended, August 14, 1946, c. 965, 60 Stat. 1080) states:

> In order to promote effectual planning, development, maintenance, and coordination of wildlife conservation and rehabilitation in the United States, its Territories and possessions, the Secretary of the Interior, through the Fish and Wildlife Service, is authorized (a) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species * * *.

And 16 U. S. C. 669, Act of September 2, 1937, c. 899, Section 1, 50 Stat. 917, provides:

> The Secretary of the Interior is authorized to cooperate with the States, *through their respective State fish and game departments,* in wildlife-restoration projects as hereinafter in sections 669–669j of this title set forth; but no money apportioned under said sections to any

> State shall be expended therein *until its legislature, or other State agency authorized by the State constitution to make laws governing the conservation of wildlife,* shall have assented to the provision of said sections and shall have passed laws for the conservation of wildlife which shall include a prohibition against the diversion of license fees paid by hunters for any other purpose than the administration of said State fish and game department * * *. The Secretary of the Interior and the State fish and game department of each State accepting the benefits of said sections, shall agree upon the wildlife-restoration projects to be aided in such State under the terms of said section and all projects shall conform to the standards fixed by the Secretary of the Interior. [Emphasis added.]

This section obviously recognizes the fact that power over conservation of wildlife is customarily entrusted to administrative agencies set up under the constitution of the state, as in Florida, or under other state statutes.[2] It also recognizes the law-making powers of such agencies.

16 U. S. C. 705 (the Migratory Bird Treaty Act, Act of July 3, 1918, c. 128, Section 4, as amended (*infra*, pp. 51–52)) prohibits, *inter alia*, the interstate or foreign transportation of migratory birds where the bird has been taken or killed contrary to the laws of the state in which it was captured or taken.[3] Section

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[3] It is paralleled by 18 U. S. C. 43 (*infra*, Appendix C, pp. 52–53), the so-called Lacey Act, which covers similar offenses with respect to both birds and animals. The adverse effects of the ruling below on the administration of both of these Acts, which parallel the Black Bass Act, is discussed *infra*, pp. 32–33.

3 of this Act, 16 U. S. C. 704, empowers the Secretary of the Interior to determine whether it is compatible with the terms of the conventions between the United States and Great Britain, and between the United States and Mexico, to allow, under proper circumstances, hunting, possession, sale, purchase, shipment or transportation of migratory birds, and it empowers the Secretary to make rules and regulations governing the same, these to become effective upon Presidential approval.

Thus, a large segment of the national conservation program is administered by rules and regulations of the Department of the Interior, and Congress has referred in its legislation on conservation to commissions as the depositaries of state power legislative in this field. The conclusion seems inevitable—in the context of the Black Bass Act itself and in the full context of the whole federal conservation legislation of Title 16—that Congress did not envisage statutory enactments as being the only laws of the states.

The consistent interpretation of the phrase "law of the state" by the Department of Interior, which, as we have shown, has been entrusted by Congress with the administration of the Bass Act, further supports the view that the phrase includes regulations of state commissions acting under lawfully delegated authority. While there has been found no specific interpretative ruling of the Department construing "law of the state", yet in practice the Department has sought prosecution of cases where the "law of the state" consisted of a regulation of a Commission.

Only 14 federal prosecutions under the Black Bass Act have occurred since 1940, because federal policy is to have violators prosecuted whenever possible under the state law. Three of these cases, however, were based on violations of rules of state commissions.[4]

This contemporaneous construction of the Act by those charged with its administration and with setting its machinery in motion is entitled to great weight, when such interpretation has been consistent and long unchallenged. *United States* v. *Zucca,* 351 U. S. 91, 96; *Mazer* v. *Stein,* 347 U. S. 201; *United States* v. *American Trucking Ass'ns.,* 310 U. S. 534, 549; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Brewster* v. *Gage,* 280 U. S. 327, 336.

B. THE LEGISLATIVE HISTORY OF THE ACT ALSO INDICATES THAT ITS PURPOSE IS TO FURNISH COMPLETE SUPPORT FOR THE CONSERVATION PROGRAMS OF ALL THE STATES, IRRESPECTIVE OF THE TYPES OF LAWS USED TO IMPLEMENT THE PROGRAMS

The original Act of 1926 was limited to black bass. Both the Senate and House Reports accompanying the bill stated (S. Rep. No. 612, 69th Congress, 1st Sess.

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[4] Under the companion Lacey ~~Act,~~ 18 U. S. C. 43, seventy-seven prosecutions have been had during the same period. Department reports do not show whether these were based on violations of State statutes or on violations of regulations. However, since the majority of the states regulate their birds and animal resources by commissions, it seems certain that a considerable percentage of these cases ~~were~~ was based on violations of rules of commissions.

(1926), and H. Rep. No. 31, 69th Congress, 1st Sess. (1925)):

> It will strengthen the laws of any State wherein the taking of bass commercially is prohibited. In some States, where such law is now on the statute books, its effect is nullified by the fact that black bass are shipped out of the State in barrels, with rough fish at the top and bottom and the bass in between.
>
> A State which, for conservation purposes, denies for a limited period the sale of black bass to its own citizens frequently finds that its State enactments are nullified by bass being taken from the waters of its own State, where its commercial use is prohibited to its own citizens, and transported from that State and sold to the citizens of another State; thus destroying the State conservation program and giving to the citizens of another State the benefit of commercial consumption which is denied its own citizens.

A letter accompanying the committee reports on this bill, addressed to the Secretary of Commerce by the Commissioner of the Federal Bureau of Fisheries, and forwarded by the Secretary to the Committee, states:

> In such boundary waters as the Potomac River it has been especially difficult for the State authorities to control the situation. During the winter months when the bass are congregated together in the deeper waters in a more or less dormant condition it is not difficult for the fishermen to seine these fishes in such quantities as to seriously deplete the supply.

> If, as provided by the terms of this bill, their shipment out of States in which their sale is illegal is prohibited, better control over the natural supply will be possible.

Both reports mentioned also that the Act was modeled after the Lacey Act, originally passed in 1900, 31 Stat. 187, 188, which prohibited transportation of birds and animals killed or shipped in violation of the laws of the states in which they were killed or from ~~which they~~ were shipped.

The Black Bass Act was amended in 1930 to provide adequate machinery for enforcement (46 Stat. 845, S. Rep. No. 75, 71st Cong., 2d Sess.; H. Rep. No. 1610, 71st Cong., 2d Sess.). It was amended again in 1947, 61 Stat. 517, ~~to make~~ its provisions applicable to all game fish. A letter from the Under Secretary of the Interior accompanying the reports again noted that existing legislation (the Lacey Act) made unlawful the interstate transportation of wild animals and birds taken contrary to state laws, and that the only legislation with respect to game fish covered only one species, namely, black bass.

The basic purpose of the Act was reiterated in the reports accompanying the 1947 amendatory bill:

> The bill is intended to supplement State laws applying to protection of game fish. * * * State laws become ineffectual when fish taken in violation of the law cross the State line. If we are to protect game fish, an important natural resource, the Federal Government must collaborate in the enforcement of protective

laws and regulations at the point where State jurisdiction ends.[5]

In 1952, the Act was again amended to extend its provisions to commercial as well as game fish. 66 Stat. 736; see H. Rep. 2148, 82nd Cong., 2d Sess.

Even if it were arguable that the Congress speaking in 1926—an earlier day in the history of administrative law[6]—did not intend to include administrative regulations in the expression "law of the state", still it is certain that by the time of the 1947 and 1952 amendments only in comparatively few states did the law-making power in this field remain solely vested in the legislature. See *infra*, pp. 31–32. Yet in these amendments Congress still used the generic term "law", and in the report accompanying the 1947 bill, *supra*, pp. 29–30, it was stated that "the Federal Government must collaborate in the enforcement of protective laws and *regulations* at the point where state jurisdiction ends." [Emphasis added.]

This history of the Black Bass Act shows conclusively that it was designed to buttress the lawmaking power of the states with respect to forbidden types of use of their fish resources—including as here, forbidden commercial uses—at the point where such state power is weakest. There is no evidence of Congressional concern with the question whether the state power was directly exercised by statute or through administrative regulations based on statutes. The only objective was to aid the enforcement of state provisions protecting fish resources.

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[5] S. Rep. No. 288, 80th Cong., 1st Sess.; H. Rep. 986, 80th Cong., 1st Sess. At this time, the phrase "or is contrary to other applicable law" was added to make the provisions of the Act operative to fish transported in violation of laws governing national parks and Indian reservations.

[6] Of course, in the field of wild life conservation, the federal government itself had been active, through regulations of the Department of the Interior, prior to this time.

C. THE STATUTORY PURPOSE WOULD BE DEFEATED AND ALL BUT NULLIFIED UNDER THE NARROW CONSTRUCTION ADOPTED BY THE DISTRICT COURT

There are relatively few states which continue to regulate wildlife through detailed legislative enactments; the large majority of the states now place authority for the regulation of their fish and game resources in commissions. The Department of the Interior, through its acting Director of the Fish and Wildlife Service, has forwarded to us a study made by the Sport Fishing Institute as published in its Bulletin No. 26, issued January 1954, on the administration and functions of state fish commissions.[7] The study reveals that full regulatory authority is vested in twenty-eight (28) states in commissions.

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[7] The Director advises that the Fish and Wildlife Service has never had occasion to make a detailed analysis of the fish and game laws of the several states. In forwarding the Bulletin, the Director noted that information concerning the organization and functions of the Sport Fishing Institute was contained in the same issue of the Bulletin. The Bulletin states that the Institute was founded by fishing-tackle manufacturers and set up as a fish conservation agency, managed by trained conservationist personnel, and having complete freedom of action. The Director states that the Institute is "highly regarded among professional fisheries workers because of its altruistic objectives, the technical competence of its staff and the timely, forthright presentation of the information contained in the periodical issues of its Bulletin and other publications."

In twelve states, commissions share the responsibility with the legislatures. In only six states out of the forty-eight, is full regulatory authority reserved to the legislatures. Of the other two, one state vests its authority entirely in an administrative official although exercised in practice in close cooperation with the commission; in the other, the authority is divided between the administrative official and the legislature, the commission being advisory only.[8]

Under the narrow interpretation adopted here by the District Court, very few states would be able to take advantage of the buttressing of their fish conservation laws which the Black Bass Act was designed to effect. Such a result, largely destructive of the prime purpose of the legislation, calls for a rejection of the interpretation which would bring it about. At the least, it would seem that very specific restrictive language would have to appear in the statute to necessitate a reading so at war with the statutory purpose.

Moreover, the confining interpretation of the district court would affect more than the conservation of fish. 18 U. S. C. 43 (*infra,* App. C, p. 52) penalizes, *inter alia,* the delivery or reception for transportation in interstate or foreign commerce of wild animals or birds captured, killed, bought, sold or possessed contrary to any Act of Congress or the law of any state, territory, possession or foreign country. And the Migratory Bird Treaty Act of July 3, 1918, c. 128, Section 4, 40 Stat. 755, 16 U. S. C. 705, as amended, *infra,* Appendix C, pp. 51–52, penalizes the transportation in interstate or foreign commerce, of any bird captured, killed, shipped, transported or carried at any time contrary to the laws of the state, territory or district in which it was captured or killed, or from which it was shipped, transported or carried. As we have just pointed out, *supra,* pp. 31–32, most of the states regulate their fish and game resources through commissions, and the states in which regulation is solely by statutory enactment are a small minority. Under the reasoning of the court below, there would be few state "laws" within the meaning of that expression as used in these two statutes.

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[8] An earlier (1948) analytical chart showing the administrative and functional status of state fish and game departments, compiled by the Wildlife Management Institute, corroborates the Sport Fishing Institutes study where comparable. Read together, they show a trend to vest more authority in commissions, with a corresponding decrease in the number of states regulating wildlife directly by their legislatures. The government's information is that the Wildlife Management Institute is similar in organization and objectives to the Sport Fishing Institute.

IV. THERE IS NOTHING IN THE ADMINISTRATION OF THE RULES OF THE COMMISSION WHICH WOULD MAKE IT A VIOLATION OF DUE PROCESS TO RECOGNIZE THOSE RULES AS THE LAW OF THE STATE

In her Motion to Dismiss or Affirm, appellee argued (pp. 9, 10) that the Commission's regulations, as administered under the machinery prescribed, deny a reasonable opportunity to know the law, and that the federal criminal statute should not be based upon "an arbitrary, vacillating, and varying rule."

That contention does not go to the issue involved in this appeal which is confined to the question of whether the term "law of the State", as used in the Black Bass Act, includes regulations of a constitutionally-created commission which, under the state constitution and by state judicial decision, are recognized as being the binding law of the state. Whether any particular method of procedure or a rule adopted by a state commission violates due process is an entirely different question, not involved in this appeal. If petitioner has a basis for attacking the validity of the state rule as a foundation for a federal prosecution, that is an issue to be determined in subsequent stages of the proceedings. It is not the question now before this Court. See Point I, *supra,* pp. 11–12.

In any event, petitioner's argument is without foundation. The rule in question, Rule 14.01, was adopted when the Commission was formed in 1943 by the Florida constitutional amendment. From 1927 to 1943 the transportation of black bass was forbidden by statute of Florida.[9] Thus there has never been any change in the Florida law on the subject during its twenty-nine year history.

Appellee's speculation on possible rapid or arbitrary change of the rule is answered fully by the very adequate machinery provided by the legislature for promulgation of the Commission's rules. Section 372.021 of the Florida Statutes Annotated provides for promulgation of the rules of the Commission as follows:

> (1) All general codes of rules, regulations and orders, and all revisions thereof and amend-

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[9] As noted *supra*, p. 7, this statute (Fla. Stat. 1941, Section 372.29) was repealed in 1951.

ments and additions, thereto, of state-wide application, made and adopted by the commission shall be promulgated by the director of the commission, by filing a certified copy thereof in the office of the secretary of state of this state and a certified copy thereof in the office of each county judge of this state, and by the publication of a notice one time in each of the congressional districts of the state in a newspaper published in and having general circulation in such district, notifying and advising the people of the state such code of rules, regulations and orders, or revisions, amendments or additions thereto, have been made and adopted by the commission and a certified copy thereof is on file in the office of the secretary of state and also in the office of each county judge in the state, and a copy thereof may be obtained from the commission at its office in Tallahassee.

(2) Such general code of rules, regulations and orders, and all revisions, amendments and additions thereto, shall become effective thirty days after the filing of a certified copy in the office of the secretary of state.

(3) All rules, regulations and orders, and all revisions thereof and amendments and additions thereto, of less than state-wide application, made and adopted by the commission, shall be filed in the office of the secretary of state and notice thereof shall be published by the director of the commission, one time in a newspaper of general circulation published in the area or areas affected by such rule or regulation, within ten days from the date of the adoption thereof. Such rules, regulations and

orders, and all revisions thereof and amendments and additions thereto shall become effective twenty days after being filed in the office of the secretary of state, and by publication as aforesaid the director of game and fresh water fish commission shall give notice such rules and regulations, and revisions thereof and amendments and additions thereto, have been adopted and may be obtained by all interested persons from the county judges of the counties within the areas affected, or from the office of the commission in Tallahassee.

(4) A copy of all rules, regulations and orders and codes of rules, regulations and orders, and all revisions, amendments and additions thereto, whether of state-wide or limited application, shall be certified by the director of game and fresh water fish commission and shall be filed with the secretary of state within ten days after the adoption thereof, and in addition thereto, the said director shall, within the said ten-day period, file in the office of each county judge of this state a true and correct copy of all rules, regulations and orders and all revisions, amendments and additions thereto. A copy of said rules, regulations and orders, and revisions, amendments and additions thereto, or any portion or portions thereof, certified by the secretary of state under the great seal of the State of Florida, or by the director of the game and fresh water fish commission under the seal of the commission, shall be received as evidence in all courts of this state without further authentication; provided, nothing herein shall be con-

> strued as preventing or prohibiting the courts from taking judicial knowledge thereof.
>
> (5) The provisions of subsections 1, 3 and 4 relating to promulgation and filing are directory and not mandatory.

The Director of the Game and Fresh Water Fish Commission of Florida has advised, in response to the government's inquiry, that any person making a request will be supplied with a copy of the Code Book, together with all existing amendments thereto which have been approved since the last printing of the book.[10]

Furthermore, it is evident from the amounts charged in this information that appellee is a commercial dealer in fish.[11] As such, she was required to be licensed under Section 372.65, Florida Statutes Annotated, as amended (*infra,* pp. 46–47). The form of license, photostatic copies of which are being lodged with the Clerk of the Court, carries the legend:

> It is unlawful for any wholesale or retail fish dealer knowingly to have or allow or permit any black bass to be stored on, in or about the premises where such wholesale or retail business is carried on or conducted.

The license also states that a holder engaged in the taking of fish must hold a valid fishing license. Section 372.69, Florida Statutes Annotated, *infra,* pp. 47–48, requires that such licenses shall contain on the back thereof a synopsis of the fresh water fishing laws of the state.

---

[10] Two copies of the Code Book which were forwarded to the Department from the Florida Commission, certified as true copies of the Rules of the Commission and dated June 29, 1956 (see p. 92 of Code Book), together with amendments certified on July 17, 1956, are being lodged with this Court.

[11] The Director of the Florida Game and Fresh Water Fish Commission advises that wholesale fish dealer's licenses have been issued to Stokes Fish Co. for a number of years.

In short, no one interested in obeying the law would have any difficulty in discovering the applicable regulations.[12]

CONCLUSION

For these reasons, it is respectfully submitted that the judgment of the District Court should be reversed.

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WARREN OLNEY III,
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AUGUST 1956.

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[12] Violation of the regulation here involved is a crime under the laws of Florida. As shown above (pp. 21–22), Section 372.83, Florida Statutes Annotated (Laws 1943, c. 21945, Section 6 as amended), makes violators of the rules of the Commission guilty of a misdemeanor, and Rule 14.01 forbids transportation of black bass. Hence, the transportation charged in this information was clearly a violation of state law and therefore a violation of the Black Bass Act.

APPENDIX A

1. 18 U. S. C. 3731 provides in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

* * * * *

2. The Black Bass Act of May 20, 1926, c. 346, Section 1 through 8, 44 Stat. 576, as amended, 46 Stat. 845, 61 Stat. 517, 66 Stat. 736, 16 U. S. C., ch. 13, provides:

> Section 1. [16 U. S. C. 851] When used in this chapter the word "person" includes company, partnership, corporation, association, and common carrier.
>
> Section 2. [16 U. S. C. 852] It shall be unlawful for any person to deliver or knowingly receive for transportation, or knowingly to transport, by any means whatsoever, from any State, Territory, or the District of Columbia, to or through any other State, Territory, or the District of Columbia, or to or through any foreign country, any black bass or other fish, if (1) such transportation is contrary to the law of the State, Territory, or the District of Columbia from which such black bass or other fish is or is to be transported, or is contrary to other applicable law, or (2) such black bass or other fish has been either caught, killed, taken,

sold, purchased, possessed, or transported, at any time, contrary to the law of the State, Territory, or the District of Columbia in which it was caught, killed, taken, sold, purchased, or possessed, or from which it was transported or contrary to other applicable law; and no person shall knowingly purchase or receive any such black bass or other fish which has been transported in violation of the provisions of this chapter; nor shall any person receiving any shipment of black bass or other fish transported in interstate commerce make any false record or render a false account of the contents of such shipment.

Section 3. [16 U. S. C. 852a] Any package or container containing such game fish transported or delivered for transportation in interstate commerce, except any shipment covered by section 855 of this title, shall be clearly and conspicuously marked on the outside thereof with the name "Fish", an accurate statement of the number of each species of such fish contained therein, and the names and addresses of the shipper and consignee.

Section 4. [16 U. S. C. 852b] All such black bass or other fish transported into any State, Territory, or the District of Columbia for use, consumption, sale, or storage therein shall upon arrival in such State, Territory, or the District of Columbia be subject to the operation and effect of the laws of such State, Territory, or the District of Columbia to the same extent and in the same manner as though such fish had been produced in such State, Territory, or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original package or otherwise.

Section 5. [16 U. S. C. 852c] The Secretary of the Interior is authorized (1) to make such expenditures, including expenditures for personal services at the seat of government and elsewhere, and for cooperation with local, State, and Federal authorities, including the issuance of publications, and necessary investigations, as may be necessary to execute the functions imposed upon him by this chapter and as may be provided for by Congress from time to time; and (2) to make such regulations as he deems necessary to carry out the purposes of this chapter. Any person violating any such regulation shall be deemed guilty of a violation of this chapter.

Section 6. [16 U. S. C. 852d] (a) Any employee of the Department of the Interior authorized by the Secretary of the Interior to enforce the provisions of this chapter (1) shall have power, without warrant, to arrest any person committing in the presence of such employee a violation of this chapter or any regulation made in pursuance of this chapter, and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; (2) shall have power to execute any warrants or other process issued by an officer or court of competent jurisdiction to enforce the provisions of this chapter or regulations made in pursuance thereof; and (3) shall have authority with a search warrant issued by an officer or court of competent jurisdiction, to make search in accordance with the terms of such warrant. Any judge of a court established under the laws of the United States, or any United States commissioner may, within his respective jurisdiction, upon proper oath or affirmation showing probable cause, issue warrants in all such cases.

(b) All fish delivered for transportation or which have been transported, purchased, received, or which are being transported, in violation of this chapter, or any regulations made pursuant thereto, shall, when found by such employee or by any marshal or deputy marshal, be summarily seized by him and placed in the custody of such persons as the Secretary of the Interior shall by regulations prescribe, and shall, as a part of the penalty and in addition to any fine or imprisonment imposed under section 853 of this title, be forfeited by such court to the United States upon conviction of the offender under this chapter, or upon judgment of the court that the same were transported, delivered, purchased, or received in violation of this chapter or regulations made pursuant thereto.

Section 7. [16 U. S. C. 853] In addition to any forfeiture provided in this chapter, any person who shall violate any of the provisions of this chapter shall, upon conviction thereof, be punished by a fine of not exceeding $200, or imprisonment for a term of not more than three months, or by both such fine and imprisonment, in the discretion of the court.

Section 8. [16 U. S. C. 854] Nothing in this chapter shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of this chapter, or from making or enforcing laws or regulations which shall give further protection to black bass and other fish.

APPENDIX B

Article IV, Section 30, of the Constitution of Florida, provides in pertinent part:

> § 30. *Game and fresh water fish commission; term; compensation; powers; director; state game fund.*
>
> 1. From and after January 1, 1943, the management, restoration, conservation and regulation of the birds, game, fur bearing animals, and fresh water fish of the State of Florida, and the acquisition, establishment, control and management, of hatcheries, sanctuaries, refuges, reservations, and all other property now or hereafter owned or used for such purposes by the State of Florida, shall be vested in a Commission to be known as the Game and Fresh Water Fish Commission. Such Commission shall consist of five members, one from each congressional district, as existing on January 1, 1941, who shall be appointed by the Governor, subject to confirmation by the Senate. The members so appointed shall annually select one of their members as Chairman of the Commission.
>
> * * * * *
>
> 4. Among the powers granted to the Commission by this Section shall be the power to fix bag limits and to fix open and closed seasons, on a state-wide, regional or local basis, as it may find to be appropriate, and to regulate the manner and method of taking, transporting, storing and using birds, game, fur bearing animals, fresh water fish, reptiles, and amphibians. The Commission shall also have the power to acquire by purchase, gift, all property necessary, useful, or convenient, for

> the use of the Commission in the exercise of its powers hereunder.
>
> * * * * *
>
> 7. The Legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment, and all existing laws inconsistent herewith shall no longer remain in force and effect. All laws fixing penalties for the violation of the provisions of this amendment and all laws imposing license taxes, shall be enacted by the Legislature from time to time. [Added, general election, 1942.]

---

14 Florida Statutes Annotated, Section 372.021, Laws 1943, c. 21945, Sections 4 and 5, provide in pertinent part:

> The game and fresh water fish commission may exercise the powers, duties and authority granted by § 30, article IV, of the constitution of Florida, by the adoption of rules, regulations and orders, or otherwise in its discretion, which said rules, regulations and orders shall be promulgated in the manner following:
>
> (1) All general codes of rules, regulations and orders, and all revisions thereof and amendments and additions thereto, of statewide application, made and adopted by the commission shall be promulgated by the director of the commission, by filing a certified copy thereof in the office of the secretary of state of this state and a certified copy thereof in the office of each county judge of this state, and by the publication of a notice one time in each of the congressional districts of the State of Florida in a newspaper published in and having general circulation in such district, notifying and advising the people of the State of Florida such code of rules, regulations and orders, or revisions, amendments or additions thereto, have been made and adopted by the commission and

a certified copy thereof is on file in the office of the secretary of state and also in the office of each county judge in the state, and a copy thereof may be obtained from the commission at its office in the City of Tallahassee, Florida.

(2) Such general code of rules, regulations and orders, and all revisions, amendments and additions thereto, shall become effective thirty days after the filing of a certified copy in the office of the secretary of state.

(3) All rules, regulations and orders, and all revisions thereof and amendments and additions thereto, of less than statewide application, made and adopted by the commission, shall be filed in the office of the secretary of state and notice thereof shall be published by the director of the commission, one time in a newspaper of general circulation published in the area or areas affected by such rule or regulation, within ten days from the date of the adoption thereof. Such rules, regulations and orders, and all revisions thereof and amendments and additions thereto shall become effective twenty days after being filed in the office of the secretary of state, and by publication as aforesaid the director of game and fresh water fish commission shall give notice such rules and regulations, and revisions thereof and amendments and additions thereto, have been adopted and may be obtained by all interested persons from the county judges of the counties within the areas affected, or from the office of the commission in Tallahassee, Florida.

(4) A copy of all rules, regulations and orders and codes of rules, regulations and orders, and all revisions, amendments and additions thereto, whether of state-wide or limited application, shall be certified by the director of game and fresh water fish commission and shall be filed with the secretary of state within ten days after the adoption thereof, and in addition thereto, the said director shall, within

> the said ten-day period, file in the office of each county judge of this state a true and correct copy of all rules, regulations and orders and all revisions, amendments and additions thereto. A copy of said rules, regulations and orders, and revisions, amendments and additions thereto, or any portion or portions thereof, certified by the secretary of state under the great seal of the State of Florida, or by the director of the game and fresh water fish commission under the seal of the commission, shall be received as evidence in all courts of this state without further authentication; provided, nothing herein shall be construed as preventing or prohibiting the courts from taking judicial knowledge thereof.
>
> (5) The provisions of subsections (1), (3) and (4) relating to promulgation and filing are directory and not mandatory.

---

14 Florida Statutes Annotated, Section 372.83, Laws 1943, c. 21945, Section 6, as amended, provides:

> Any person violating any rule, regulation or order of the game and fresh water fish commission adopted pursuant to § 30, article IV, of the constitution of this state and this chapter shall be guilty of a misdemeanor.

---

14 Florida Statutes Annotated, Section 372.65, Laws 1929, c. 13644, Section 31, as amended, Laws 1955, c. 29615, Section 7, provides:

> No person shall engage in the business of wholesale or retail fresh-water fish dealer until such person has taken out a license to carry on such business, as provided for in this chapter. A wholesale dealer shall be considered one who sells or ships fish by the barrel or

half barrel, or in bulk, and shall be required to pay a license fee of fifty dollars per annum. A retail dealer shall be considered anyone who sells fish or supplies in any manner direct to the consumer or wholesale dealer, and shall pay a license fee of five dollars per annum; a non-resident [wholesale] dealer shall be required to pay a license fee of five hundred dollars per annum, a non-resident or alien retail dealer shall be required to pay a license fee of fifty dollars per annum. Application shall be made to the commission of game and fresh water fish for the licenses set forth in this section and § 372.66, on blank forms to be supplied by it, and such license shall be dated and issued only for the open season and all moneys derived from this source shall be deposited in the state treasury to the credit of the state game fund. This does not apply to dealers operating exclusively in salt water territory.

---

14 Florida Statutes Annotated, Section 372.68, Laws 1929, c. 13644, Section 63, provides:

> All dealers in fresh-water fish shall, at the end of each month, report to the commission of game and fresh water fish the amount of the different kinds of fresh-water fish that they have sold during the past month. Failure to make such report shall cause such dealer to be denied license for ensuing year.

---

14 Florida Statutes Annotated, Section 372.69, Laws 1929, c. 13644, Section 22, as amended Laws 1955, c. 29615, Section 33, provides:

> The blank forms and other printed matter necessary to carry out the provisions of this chapter shall be furnished by the commission of game and fresh water fish, which is required

to make up forms of licenses or other blanks necessary, the same to be uniform throughout the state, and to furnish the same to the county judges of the several counties and authorized agents. The said license shall contain on the back thereof a synopsis of the game trapping or fresh water fishing laws of the State. All licenses shall be consecutively numbered.

Rule 14.01 of the Rules and Regulations of the Game and Fresh Water Fish Commission of Florida provides:

No person or persons shall sell, attempt to sell, offer for sale, barter, purchase, offer to purchase, attempt to purchase, or exchange for merchandise or transport, transport for sale, or transport out of the State of Florida any large or small mouth black bass, speckled perch, jack, shell cracker, warmouth perch, red breast, pike, stump knocker, sun fish, or Canadian sunfish, or any other species of bream; provided, that holders of valid fishing licenses may carry out of the State or transport as personal baggage their legal bag limit thereof; and provided further that the Director may issue permits for transportation of black bass, speckled perch, jack, bream, shell cracker, warmouth perch, red breast, pike, stump knocker, or any other species of bream within or out of the State of Florida for propagation or scientific purposes only. No common carrier shall knowingly transport or receive for transportation within the State of Florida any black bass, speckled perch, jack, bream, shell cracker, warmouth perch, red breast, pike, stump knocker, or any other species of bream. It is the intention of this Rule to prohibit within the limits of the State of Florida the sale, transportation and/or shipment of any species of fresh water game fish indigenous to the waters of the State of

Florida, as well as other fresh water game fish the sale or offering for sale of which would impede or interfere with the enforcement of the Rules and Regulations of the Commission with respect to the taking, possession and the sale of fresh water game fish of the same or apparently the same species, whether such fresh water game fish were caught from the waters within the State of Florida or elsewhere, except as otherwise provided in the Rules.

Rule 3.06 of the Rules and Regulations of the Game and Fresh Water Fish Commission of Florida provides in pertinent part:

* * * * *

> The following licenses are considered Commercial Licenses and are issued direct from the office of the Director of the Game and Fresh Water Fish Commission in Tallahassee, Florida. All commercial licenses shall expire on June 30 of the fiscal year during which they are issued.

* * * * *

> No person shall engage in the business of wholesale or retail fresh water fish dealer without having first obtained license and paid the license fee required by law. Rights and privileges under said licenses shall be as hereinafter set out.

* * * * *

> All residents of the State who shall obtain license for fee provided by law, who sell or ship fish by the half barrel, barrel or in bulk, shall be deemed to be Resident Wholesale Dealers.

* * * * *

> * * * All agents representing Resident or Non-Resident Retail or Wholesale Fish Dealers shall be in possession of the license or positive

proof that such license has been issued and is valid and in good standing.

Rule 11 of the Rules and Regulations of the Game and Fresh Water Fish Commission of Florida provides in pertinent part:

* * * * *

> It shall be unlawful for any wholesale or retail fish dealer knowingly to have or allow or permit any black bass, bream, crappie, or any other game fish to be stored on, in or about the premises where such wholesale or retail fish business is being carried on or conducted. Fish legally caught may be kept in public cold storage, refrigerators, ice houses or ice boxes when packaged or on strings with tag or tags clearly identifying the owner of such fish, and his license number clearly written thereon, if license is required therefor.

APPENDIX C

1. The Migratory Bird Treaty Act of July 3, 1918, c. 128, Section 4, 40 Stat. 755, as amended, 49 Stat. 1556, 53 Stat. 1433, provides in pertinent part:

> It shall be unlawful to ship, transport, or carry, by any means whatever, from one State, Territory, or District to or through another State, Territory, or District, or to or through a foreign country, any bird, or any part, nest, or egg thereof, captured, killed, taken, shipped, transported, or carried at any time contrary to the laws of the State, Territory, or District in which it was captured, killed, or taken, or from which it was shipped, transported, or carried. It shall be unlawful to import any bird, or any part, nest, or egg thereof, captured, killed, taken, shipped, transported, or carried contrary to the laws of any Province of the Dominion of Canada in which the same was captured, killed, or taken, or from which it was shipped, transported, or carried.

2. 18 U. S. C. 43 provides:

> Whoever delivers or knowingly receives for shipment, transportation, or carriage in interstate or foreign commerce, any wild animal or bird, or the dead body or part thereof, or the egg of any such bird imported from any foreign country, or captured, killed, taken, purchased, sold, or possessed contrary to any Act of Congress, or the law of any State, Territory, Possession, or foreign country, or subdivision thereof; or
>
> Whoever transports, brings, or conveys from any foreign country into the United States any wild animal or bird, or the dead body or part thereof, or the egg of any such bird captured,

killed, taken, shipped, transported, or carried contrary to the law of such foreign country or subdivision thereof; or

Whoever knowingly purchases or receives any wild animal or bird, or the dead body or part thereof, or the egg of any such bird imported from any foreign country or shipped, transported, carried, brought, or conveyed in violation of this section; or

Whoever, having purchased or received any wild animal or bird, or the dead body or part thereof, or the egg of any such bird imported from any foreign country or shipped, transported, or carried in interstate commerce, makes any false record or account thereof; or

Whoever imports from or exports to Mexico any game mammal, dead or alive, or parts or products thereof, except under permit or authorization of the Secretary of the Interior, in accordance with regulations issued by him and approved by the President—

Shall be fined not more than $500 or imprisoned not more than six months, or both; and the wild animals or birds, or the dead bodies or parts thereof, or the eggs of such birds, shall be forfeited.

3. 18 U. S. C. 44 provides:

Whoever ships, transports, carries, brings or conveys in interstate or foreign commerce any package containing wild animals or birds, or the dead bodies or parts thereof, without plainly marking, labeling, or tagging such package with the names and addresses of the shipper and consignee and with an accurate statement showing the contents by number and kind; or

Whoever ships, transports, carries, brings or conveys in interstate commerce, any package containing migratory birds included in any convention to which the United States is a party, without marking, labeling, or tagging such package as prescribed in such convention, or Act of Congress, or regulation thereunder; or

Whoever ships, transports, carries, brings or conveys in interstate commerce any package containing furs, hides, or skins of wild animals without plainly marking, labeling, or tagging such package with the names and addresses of the shipper and consignee—

Shall be fined not more than $500 or imprisoned not more than six months, or both; and the shipment shall be forfeited.

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No. 62

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

LUDENIA HOWARD, TRADING AS STOKES FISH CO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 52

UNITED STATES OF AMERICA, APPELLANT
v.
LUDENIA HOWARD, TRADING AS STOKES FISH CO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is filed at the Court's request in response to questions raised at the oral argument. In answering these questions we make reference to certain of the materials contained in our main brief so that the questions discussed in this memorandum may be treated in full context.

1. The Court has requested information with respect to the manner of publication, distribution, and status of the rules of the Florida commission.

A Florida statute, 14 Florida Statutes Annotated, Section 372.021, Br. p. 44,[1] prescribes the manner in which the commission shall promulgate its regulations.

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[1] References designated "Br." are to the Brief for the United States.

Although by virtue of subsection 5 of this statute, subsections (1), (3) and (4) are directory and not mandatory, subsection 2 is mandatory, and this subsection provides that regulations of state-wide application shall become effective thirty days after the filing of a certified copy in the office of the secretary of state. The rule in question, Rule 14.01, Br. p. 48, is of state-wide application and appellee cannot contend that she has been hurt because other rules may become effective at an earlier date. Indeed, appellee does not claim that the directions contained in the other subsections of the statute are not actually followed by the Florida commission and a letter from the commission, App. *infra*, p. 11, indicates that even more is done than is required or directed by the statute to inform the public of the contents of the rules.

Subsection (1) of Section 372.021 provides that, in addition to the filing of a certified copy of the regulations with the secretary of state, a certified copy shall be filed in the office of each county judge of the state. The Florida commission has advised, Br. p. 37, that any person making a request will be supplied with a copy of the Code Book together with all existing amendments thereto which have been approved since the last printing of the book. With exceptions not here material, a license must be obtained before one may fish in Florida and these licenses may be issued by the county judges. Rule 3.06, Wildlife Code of the State of Florida. Thus, copies of the regulations are filed in the very office from which fishing licenses may be obtained.

Subsection (1) of Section 372.021 also provides for publication of a notice in a newspaper having general circulation in each of the congressional districts of the state advising that such rules have been promulgated and are on file in the office of the secretary of state and of each county judge and that a copy thereof may be obtained from the commission itself.

The Government has been further advised by the Florida commission that it has been the practice to amend the rules of the commission as often as revisions are warranted, normally on the average of once or twice a year. Several thousand copies of the code book containing these rules are printed. These copies are circulated without cost, not only to the county judges as required by the statute, but to principal sporting goods and license dealers and anyone else requesting a copy as well.[2] See App. *infra,* p. 11. And before regulations of general state-wide application are promulgated, it is the practice of the commission to hold public meetings to discuss the proposed changes. See App. *infra,* p. 11.

Thus, there is a greater likelihood that the average interested citizen would learn of a change in a rule of the commission than there is that he would learn of a change in a Florida statute or of a decision of the Florida Supreme Court, which appellee concedes would also constitute the "law" of the state. (Appellee's Reply Brief, pp. 9–10).[3]

---

[2] Nine copies of the Wildlife Code in use at the time of the alleged offense are filed with the Court herewith. Only two copies of the code, as amended April 1956, had been filed with the Court prior to oral argument, not because copies are difficult to obtain, but because the Government assumed that, in determining the intent of Congress as manifested in a statute which was not limited in its application to Florida, the exact provisions of sections of the Florida Wildlife Code not related to this offense have, at best, only tangential relevance. Br., pp. 10, 33–34.

With respect to the status in Florida of the regulations of the commission, it is conceded that in that state they are given the force and effect of valid and binding law. (Appellee's Reply Brief, p. 12; see Government Br., pp. 17–20.) Appellee urges only that the regulations are not "the law of Florida as contemplated by the Black Bass Act" and does not contend that the rules of the commission violate any provision of the constitution of Florida or of the United States. The Florida legislature has itself referred to the regulations of the fish and game commission as being "laws." Thus, 14 Florida Statutes Annotated, Section 372.07 provides:

> *Section 372.07. Police powers of commission and its agents.*—The commission of game and fresh water fish and each and every of its duly authorized conservation agents, have power and authority, throughout the state, to enforce all

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[3] In fact, it has been the law of Florida consistently since 1927 that out-of-state transportation of black bass is illegal. See Br., p. 34. And we are advised by the commission, except for the period between February 1952 and June 1953 when a controlled seining program was in effect and bream, crappie, and like fish could be so transported when properly tagged, out-of-state transportation of bream and crappie has been illegal in Florida consistently since 1943. Thus the rules of the Commission with respect to the subject matter covered by this information have not been as variable or difficult of ascertainment, as appellee suggests. As a commercial fish dealer, appellee must have been familiar with the rules of the Commission. See Br., p. 37.

laws relating to game, non-game birds, fresh water fish and fur-bearing animals, and in connection with said *laws,* in the enforcement thereof, and in the performance of their duties thereunder, to go upon all premises, posted or otherwise; execute warrants and search warrants for the violation of said *laws;* serve subpoenas issued for the examination, investigation and trial of all offenses against said *laws;* carry firearms or other weapons, concealed or otherwise, in the performance of their duties; arrest upon probable cause without warrant any person found in the act of violating any of the provisions of said *laws* or, in pursuit immediately following such violations, examine any person, boat, conveyance, vehicle, game-bag, game-coat or any other receptacle for game, non-game birds, fresh water fish or fur-bearing animals, or any camp, tent, cabin or roster in the presence of any person stopping at or belonging to such camp, tent, cabin or roster, when he has reason to believe, has exhibited his authority and stated to the suspected person in charge his reason for believing that any of the aforesaid *laws* have been violated at such camp; secure and execute search warrants and in pursuance thereof, to enter any building, enclosure or car and to break open, when found necessary, any apartment, chest, locker, box, trunk, crate, basket, bag, package or container and examine the contents thereof; seize and take possession of all game, non-game birds, fresh water fish and fur-bearing animals, which may have been taken or had in possession or under control or which have been shipped or about to be shipped at any time or in any manner contrary to said *laws.* [Emphasis added.]

And 14 Florida Statutes Annotated, Section 372.70 provides:

> *Prosecutions.*—The prosecuting officers of the several *courts of criminal* jurisdiction of this state shall investigate and prosecute all violations of the *laws* relating to game, fresh-water fish, non-game birds and fur-bearing animals which may be brought to their attention by the game and fresh water fish commission or its conservation officers, or which may otherwise come to their knowledge. [Emphasis added.]

Under the Florida Constitution, Art. IV Section 30, Br. pp. 43–44, supreme authority to regulate fresh-water fishing is vested in the commission and the legislature may enact laws, other than those fixing penalties and license taxes, only "in aid of, but not inconsistent with" those of the commission. Therefore, when the Florida legislature speaks of "laws" relating to fresh-water fish, it must have reference to the rules promulgated by the commission. *Bronson* v. *Florida,* 83 So. 2d 849, Br., p. 18. There would be no other "laws" to which the statute could refer; if Sections 372.07 and 372.70 do not include the commission's rules and regulations under the term "laws" those general provisions of the Florida statutes would have minimal effect, if any at all.

The Government's contention that the status of the commission rules as valid and binding law within the state of Florida is determinative of their status as "the law of the state" within the meaning of the Black Bass Act is entirely consistent with the holding in *United States* v. *Eaton,* 144 U. S. 677. There, a statute (24 Stat. 209) levied a tax on oleomargarine and regulated in detail oleomargarine manufacturers. Section 5 of the statute provided for the keeping of such books and records as the Secretary of the Treasury might require, but that Section imposed no penalty for non-compliance with its provisions. Section 18 of the act provided a penalty for the failure to "do, or cause to be done, any of the things required by law * * *." The question presented was whether a dealer in oleomargarine who failed to keep a book and make a monthly return prescribed in a regulation, failed, within the meaning of Section 18 of the act, to do a thing "required by law." The Court held that he did not because the statute imposed no penalty for any neglect to keep the books required by the regulations. In *United States* v. *Grimaud,* 220 U. S. 506, the *Eaton* case was distinguished and not followed where the statute in question contained a provision punishing for a violation of regulations issued pursuant to the statute. See also *In re Kollock,* 165 U. S. 526. And in *Singer* v. *United States,* 323 U. S. 338 this Court wrote, at p. 345:

> *United States* v. *Eaton* turned on its special facts, as *United States* v. *Grimaud,* 220 U. S. 506, 518–519, emphasizes. It has not been construed to state a fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute.

The instant case is one where, as in *Grimaud* and *Kollock* and unlike *Eaton,* a violation of the rules and regulations of the commission is a misdemeanor within the state of Florida. 14 Florida Statutes Annotated, Section 372.83, Br., p. 46, provides that:

> Any person violating any rule, regulation or order of the game and fresh water fish commission adopted pursuant to § 30, article IV, of the constitution of this state and this chapter shall be guilty of a misdemeanor.[4]

Thus, even if the Black Bass Act be construed only to apply to violations of state statutes, a Florida statute would have been violated had the fish been transported in the manner alleged in the information.

2. The Court has inquired as to the extent to which the states enforced conservation programs through administrative bodies in 1926.

We have requested the Solicitor, Branch of Fish and Wildlife, Department of the Interior, to ascertain how many states had fish commissions with regulatory authority when the Black Bass Act was first enacted in 1926. As soon as this information (which is not now available in collected form) has been compiled, we will forward it to the Court. We respectfully suggest again, however, that the dates of the subsequent amendments of the Black Bass Act in 1947 and 1952 and the conditions which existed at the time of such amendments are also pertinent. The 1947 amendment of the Black Bass Act extended its provisions to apply to all game fish and not merely to the one species. At that time, Congress reexamined the purpose and effects of the Black Bass Act and the reports accompanying the bill state that "* * * the Federal Government must collaborate in the enforcement of protective laws and regulations at the point where State jurisdiction ends," S. Rep. No. 288, 80th Cong., 1st Sess.; H. Rep. 986, 80th Cong., 1st Sess., Br., pp. 29-30. In view of the nature of the 1947 amendment and the legislative history which surrounds it, the conditions which were prevalent in the states as of 1947 are relevant in ascertaining the intent of Congress. As indicated at pp. 31–32 of the Government's brief, surveys conducted in 1948 and 1953[5] indicate that the overwhelming majority of states administer conservation programs through commissions.

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[4] 14 Florida Statutes Annotated, Section 372.71 provides:

> *372.71 Fines and penalties; forfeiture of license*
>
> Any person violating the provisions of this chapter, shall, upon conviction, unless otherwise provided, be fined for the first offense not less than ten dollars nor more than three hundred dollars, or imprisoned not to exceed ninety days, and for a second or subsequent offense shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months. Any person convicted as aforesaid shall forfeit any license or permit that may have been issued to him under the provisions of this chapter and shall forthwith surrender the same to the court. If such violation occurs in the open season no license or permit shall be issued under the provisions of this chapter to such person at any time during the remainder of such open season, or if such violation occurs during the closed season no license shall be issued to such person for the open season next following.

---

[5] The Black Bass Act was amended in 1952 to extend its coverage to all fish, not merely game fish. Br., p. 30.

Nine copies of the survey made in 1948 by the Wildlife Management Institute and of the 1953 survey of the Sport Fishing Institute, summarized at p. 60 of the Sport Fishing Institute Bulletin, January, 1954, are submitted herewith.

Respectfully submitted.

J. Lee Rankin,
Solicitor General.
Warren Olney III,
Assistant Attorney General.
Leonard B. Sand,
Assistant to the Solicitor General.
Beatrice Rosenberg,
Joseph A. Barry,
Attorneys.

December, 1956.

APPENDIX

FLORIDA GAME AND FRESH WATER
FISH COMMISSION,
Tallahassee, December 6, 1956.

Re *United States* v. *Ludenia Howard,*
D. J. File No. 138-18-1.

Honorable J. LEE RANKIN,
Solicitor General,
Washington, D. C.

DEAR MR. RANKIN: We have in a telephone conversation this date discussed several matters pertaining to fishing and hunting regulations changes and procedures with Mr. Leonard B. Sand of your office.

For your information, the Rules and Regulations of the Florida Game and Fresh Water Fish Commission are printed in the Code Book, copies of which have been forwarded to Mr. Sand. This Code Book is revised as often [as] revisions warrant, normally from twice a year to an annual revision.

Several thousand copies of the Code Book are printed. They are placed in the hands of the Secretary of State, the County Judges, the County Prosecuting Attorneys, principal sporting goods and license dealers, and anyone else requesting a copy.

When minor changes are made in the Regulations at Commission meetings, two weeks prior notice of such meetings is published in papers having general circulation in Florida. Then such minor changes are certified to the Secretary of State, the County Judges and advertised in the papers. It is also the practice of the Game and Fresh Water Fish Commission when regulations of a general state-wide nature are anticipated to conduct public hearings throughout the State, giving all interested citizens an opportunity to participate in a discussion of the Rules and Regulations with the Commission. These meetings are held annually and we might add that before the last regulations were approved, twelve such public hearings were held in various points throughout the State. This has been the practice for some time and the newspapers and radio stations of the State are most generous in appraising the people of all Rules and Regulations of the Commission.

We are pleased to pass this information on to your office. If we can be of any further service, please advise.

Very truly yours,

/s/ A. D. Aldrich,
A. D. ALDRICH, *Director.*

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 800

UNITED STATES OF AMERICA, APPELLANT

v.

LUDENIA HOWARD, TRADING AS STOKES FISH COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

APPELLEE'S BRIEF, INCORPORATING MOTION TO AFFIRM OR DISMISS

STATEMENT OF FACTS

Copy of the District Court's opinion in this case is correctly incorporated in Appendix A of Appellant's Statement as to Jurisdiction. However, the full scope of the questions involved are not disclosed there, due to the incomplete statement as to the Information, and by failure to set out the Motion to Quash the Information. Therefore, we set out in the Appendix to this brief, copy of "Information", and "Motion to Quash Information."

The Information in this case (App. p. 18) does not allege that Ludenia Howard personally delivered the said shipment, or had any knowledge of the delivery thereof, or had any knowledge that any black bass or other forbidden fish were contained therein. Furthermore, said Information fails to allege that the said fish were not within the bag limit permitted to persons holding a valid fishing license.

The adequacy of the "Information" to charge an offense because of the lack of averments contained therein, was duly challenged by the Motion to Quash, which is also set out in the Appendix to this brief, p. 19. The Court, finding that the Federal Statute does not apply in this case, because there was no "law" in Florida which made the Act illegal, did not proceed to examine, or at least did not incorporate in his order a finding upon, the other grounds raised in the said motion. However, the Motion to Quash would be good if **any** ground contained therein was valid, and if the Information was defective for **any** reason. Reasons **other** than the construction of the Federal Statute, were certainly raised, and were certainly involved in the case. Had the learned judge not found that the Federal Statute was not applicable, there is no reason to believe that he might not well have given consideration to, and have quashed, the Information for lack of sufficient averments.

In the State of Florida, there is no statute or "law" that would make the act charged an offense. The most that can possibly be claimed by the Appellant is that the Federal statute applies if fish have been transported in violation of a transitory **rule or regulation** of the Game and Fresh Water Fish Commission. (Such alleged violation we do not concede.)

DISCUSSION OF APPELLANT'S QUESTION

Appellant's single question, as stated in its brief, we believe to be fundamentally correct, although immaterial matters are incorporated therein. However, we think this is not the **sole question** involved, and we add the following:

APPELLEE'S QUESTION

> Where the Motion to Quash filed against an Information is based, among other things, upon independent grounds that the Information is defective for failure to contain sufficient averments, as well as on the ground involving the construction of a Federal statute; and where there is grave question as to the sufficiency of the Information to **state a cause** of action for lack of necessary averments; and where the court might well have quashed the Information upon the ground of insufficient averments; and the court, being of the opinion that the Federal statute did not apply, based its order thereon, and thus refrained, as unnecessary, from discussing or considering the other defects in the Information; —does an appeal from such an order lie direct to the Supreme Court of the United States, or should it have been taken to the Circuit Court of Appeals?

ARGUMENT

as to Appellant's question, which is as follows:

> "Whether the district court erred in construing the term 'law of the State', as used in the Federal Black Bass Act (which prohibits interstate transportation of black bass and oth-

> er fish if such transportation is contrary to the law of the state from which the fish is transported), as not including regulations issued by the Florida Game and Fresh Water Fish Commission, where (1) the Commission was created by a Florida constitutional amendment which vested it with sole authority to regulate transportation of fresh water fish in Florida and (2) the constitutional amendment provided that the legislature could pass laws in aid of the provisions of the amendment but not inconsistent therewith."
>
> (Statement as to Jurisdiction, p. 2)

The Appellant contends that this question is a very substantial question. This may or may not be correct. It certainly is very substantial from the standpoint of the Defendant—a very respectable and respected woman who is accused of a crime. We are without knowledge as to what the "Sport Fishing Institute Bulletin" may say, or the accuracy thereof. We certainly do not concede its authenticity, and we think it unimportant as compared with the liberty of this citizen. Clearly the one Federal statute relied upon by Appellant does not attempt to define the crime of transporting black bass and other fish, except by reference to the "law of the State" in question. It is not an offense in this case unless such transportation is contrary to the "law of the State" of Florida. There is no statute in Florida making the Act complained of illegal. If anything, there is only the "rule" of the Game and Fresh Water Fish Commission that has been violated (which violation we do not concede).

The Federal statute under which this Information was brought makes it an offense against the Federal law to transport certain fish by any means from any state or territory, if such transportation is contrary to the "law of the state . . .". (See Federal Black Bass Act, Appendix B, p. 20 of Appellant's brief). This is a **penal** statute and, being such, it must be **strictly construed.** In this country, the liberty of its citizens is considered so important that an offense charged must be plainly within the statute. There are no **constructive offenses.**

United States v. Resnick et al
Same v. Acme Can Co.
299 U.S. 207; 57 S. Ct. 126

* * * *

"Charles Resnick and Joseph Resnick, partners trading as L. Resnick and Sons, were indicted on charges of selling for fruits and vegetables two-quart metal hampers which were not of any standard size authorized by statute and did not come within any tolerance established by the Secretary of Agriculture, and the Acme Can Company was indicted on charges of manfacturing two-quart metal hampers that were not of any authorized size or within prescribed tolerances without having submitted dimension specifications to the Secretary of Agriculture, and of sale thereof. From judgments sustaining demurrers in each case and discharging the defendants, the United States appeals"

* * * *

"(2-6) Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the **words used.** United States v. Wiltberger, 5 Weat. 76, 95, 5 L. Ed. 37; Fasulo

v. United States, 272 U.S. 620, 628, 47 S. Ct. 200, 201, 71 L. Ed. 443........."

* * * *

"Before one may be punished, it must appear that his case is plainly within the statute; there are not constructive offenses. United States v. Lacher, 134 U.S. 624, 628, 10 S. Ct. 625, 33 L. Ed. 1080; United States v. Chase, 135 U. S. 255, 261, 10 S. Ct. 756, 34 L. Ed. 117; Fasulo v. United States, supra, 272 U. S. 620, at page 629, 47 S. Ct. 200, 202, 71 L. Ed 443 ...." (emphasis supplied)

---

50 Am. Jur., p. 430

"S407 Penal Statutes. — It has long been a well settled general rule that penal statutes are subject to strict construction. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. The rule is founded on the tenderness of the law for the rights of individuals; its object is to establish a certain rule, by conformity to which mankind would be safe, and the discretion of the court limited........"

* * * *

(p. 433)

"S409. Application of Strict Construction.—In the interpretation of a penal statute, the tendency is to give it careful scrutiny, and to construe it with such strictness as to safeguard the rights of the defendant. If the statute contains a patent ambiguity, and admits of two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be pre-

> ferred, and where there is any well-founded doubt as to any act being a public offense, it should not be declared such, but should rather be construed in favor of the liberty of the citizen. Hence, penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used. Acts in and of themselves innocent and lawful cannot be held to be criminal unless there is a clear and unequivocal expression of the legislative intent to make them such. Whatever is not plainly within the provisions of a penal statute should be regarded as without its intendment. Such a statute should not be interpreted to impose restrictions on conduct not specifically enumerated in the legislative act, or to include cases omitted by the legislature, and which do not fall within the scope of the law. The fact that the statute may be easily evaded furnishes no excuse for supplying by judicial construction that which is palpably omitted therefrom. These rules prevail even though the court thinks that the legislature ought to have made the statute more comprehensive."

The foregoing principle is certainly not contradicted by the case, cited by the Appellant, of **Lilly v. Grand Trunk R. Co.,** 317 U. S. 481. This was **not** a criminal case, but, on the contrary, the court adopted the principle of liberal construction because the statute was for the **protection of employees.** The Court said:

> "The Act, like the Safety Appliance Act, 45 U.S.C.A. No. 1 et seq., is to be liberally construed in the light of its prime purpose, the

> protection of employees and others by requirnig the use of safe equipment........"
>
> Lilly v. Grand Trunk R. Co.
> 317 U.S. 481; 63 S. Ct. 347, 351

Likewise, the case of **Atchison, T. & S. F. Ry Co. v. Scarlett,** 300 U. S. 471, does not support the contention of the Appellant and does not conflict with the foregoing principle. This again was **not a criminal** prosecution, but applied to regulations for the safety of railroad employees and, therefore, was entitled to liberal construction. Likewise, the case of **Roumanian American Winery, Inc. v. Morgenthau,** 152, F. 2d 452, cited by Appellant, does not sustain Appellant's contention. This again was **not a criminal prosecution,** but was an attempt to secure a wine producer's and wholesaler's permit, and the question was whether or not the petitioner was a fit person to have such a permit, and had therefore been complying with the Federal law and rules and regulations regulating such business. The case is wholly without application to the case at Bar. Likewise, the case of **Phillips v. United States,** 312 U.S. 246, cited by the Appellant, was **not a criminal case,** but was a suit brought to restrain further interference with the closing or completion of a dam on a river in Oklahoma, and wholly fails to support the contention of the Apellant. It is without value in this case.

We frankly and freely concede that the Game and Fresh Water Fish Commission is a constitutionally created commission. We also concede, without argument, that its rules are enforced in the State of Florida so long as those rules are within the scope of the amendment creating it. For these purposes they are given the force and effect of law. However, these rules are not the **law of Florida.** They are still **rules** of the Game and Fresh Water Fish Commission. Even the Commission itself does not call them **law.** It calls them **"rules."** They are printed in a little pamphlet known as the Wild Life Code. The laws of Florida are published by the Secretary of State as "Florida Statutes", and by Harrison & Company and West Publishing Company as the "Florida Statutes Annotated." These laws are revised every two years after the Legislature adjourns, and they remain the law, as interpreted by our courts, until the Legislature convenes two years hence. The **rules** of the Game and Fresh Water Fish Commission are found nowhere among these **laws.**

There is a very fundamental and impelling reason why these rules are not found among our **statutes.** They can, and often do, change with the moon, and are as variable as the tides. A **rule** of the Game and Fresh Water Fish Commission may be passed today and filed with the Secretary of State. The Legislature says it shall become effective thirty days thereafter. Whether it had the authority to say that or not, is questionable. But, at any rate, tomorrow at an early breakfast the Game and Fresh Water Fish Commission can change its **mind** and change its **rule,** and file a new pronouncement with the Secretary of State, which will become effective thirty days thereafter. It would not be likely to do this every day, but there is certainly no restriction upon how often it can do it, except its own discretion. The Legislature, recognizing the inability of the citizens, or even the lawyers, of the State to know what the rule is at a particular moment, prescribes certain things that the Commission should do, like sending copies to the county judges, but all these provisions are merely directory and not mandatory (see par. (5), Sec. 372.021, F.S.A., p. 24 of Appendix to Appellant's brief), and do not reach the heart of the evil. This little pamphlet can be obtained from the Commission, and may be shown to be authentic as of a **particular date** written in pen and ink, so that if the rule or regulation is changed the next day, the next week, or the next month, they can write in a different date.

For the United States Government to predicate its criminal statutes upon such an arbitrary, vascillating, and varying **rule or regulation,** would have most serious and far-reaching consequences. The enforcement of law must necessarily depend upon the principle that ignorance of the law is not a defense, but this must be predicated upon the corollary that a citizen shall be given a reasonable opportunity to ascertain the law and to know it and to learn it, and that he must not close his eyes to the law and then use ignorance of it as an excuse. All this philosophy fails if the citizen has no reasonable opportunity to learn the law, and if the law may be changed more rapidly than it can be learned.

The Florida decision cited by the Appellant, to-wit: **Bronson v. State of Florida,** 83 So. 2d 849, dealt primarily with resisting arrest. However, after the defendant was arrested, he was found to have alligator hides under eight feet in length, in violation of a rule of the Game and Fresh Water Fish Commission. Before the court decision had been handed down, the rule had been changed to alligator hides under **six feet.** There probably are not ten lawyers in the State of Florida who at the present moment would know whether the rule is now four feet or ten feet, or no feet, unless he has had occasion within the last few days to secure from the Game Commission the little pamphlet certified in ink as being one as of a certain date. Even then, without telephoning the Secretary of State, he would not know but what the rule had been changed the next day. The several Florida decisions cited by Appellant are not determinative of the issue in this case. We have already readily admitted that the **rules** of the Commission are enforceable in the State, but it does not follow that a penal Federal Statute automatically attaches, when to do so would violate the **words** and the **principles** in such Statute.

The most essential thing in this United States is for its citizens to obey and bow to the majesty of the law, and respect it. This implies, as a necessary corollary, that the law can be known so that it can be obeyed, and so that it can be respected. One can not obey, nor can one respect, the unknown, and this great objective is a two-fold proposition. It places upon the lawmakers the duty of making and explaining its law so that it can be known and obeyed, as well as the duty upon the citizen to diligently strive to know and to obey it. To extend a Federal statute, criminal in its nature, based upon the **law** of Florida, so as to make that Federal statute conditioned upon the violation of an **arbitrary and changing rule** or regulation, is to violate the foregoing principles.

Furthermore, to extend the basis of the Federal statute beyond the State law, as codified in our statute books, is to start down a path, the end of which we can not see. If this can be applied to a **rule** of the Game and Fresh Water Fish Commission of five members, it would likewise apply if the number were reduced to three—to two—to one. If it applies when the only restriction upon its change is the **whim** and **feelings** of the Commission, it could be applied to the whim and feelings of a single individual. If it can be applied when the rule need not be codified and when the only requirement is that it be filed with the Secretary of State within thirty days, it would likewise be applicable if the thirty days were reduced to twenty—to ten—abolished altogether.

When Congress passed this Act in question in 1926, it certainly did not have in mind any rules of the State Game and Fresh Water Fish Commission, because such Commission did not become operative until January 1, 1943. Had Congress intended that this Act should apply to rules of a **commission**, or the orders or rules of some State executive officer, not codified, not known, nor of any regular or definite standing—then the Congressional Act could well have cured this ambiguity by saying also the "rules and regulations of any commission of any official, when such rules and regulations are enforced within the state." But the Congressional Act **did not say this!** To read this into it now, by **construction**, is to read into it what was not said and what was not there before. To make this statute the basis of this criminal prosecution, it is necessary to stretch it by interpretation beyond the language of the Act—we believe beyond the intention of the Act—and create a constructive offense. We respectfully submit that this is not only outside the language of the Statute as passed by the Congress; but it is not in accordance with its intendments, and that it imperils and jeopardizes, without due process of law, the liberty of our citizens.

We respectfully submit that the "law of the State" of Florida, as used in the Federal Black Bass Act of 1926 as a basis for criminal prosecution, had reference to the laws of Florida that are to be found in the statutes of the State of Florida, and as interpreted by our courts. It was never intended to include, and does not include, rules and regulations as changeable as the winds, and that can not possibly be codified and included among our State laws for the reason that they do not have the necessary permanence.

> **Stoffel v. W. J. McCahan Sugar Refining & Molasses Co. 35 Fed. 2d 602 (Penn.)**
>
> * * * *
>
> (Headnote)
>
> "2. United States, Key 5—United States Law is to be Found in Constitution, Congressional Acts, Treaties, and Matters Specially Committed to Judicial Power in Court Rulings.
>
> "Law of state is to be found in its statutory and constitutional enactments as interpreted by its courts, and, in absence of statute law, in rulings of its courts, whereas law of United States is to be found in Constitution and acts of Congress passed pursuant thereto, and in its treaties as interpreted by courts,

and in those matters specially committed to judicial power in rulings of its courts."

* * * *

(In the case)

"....The law of a state, as, for illustration, that of Pennsylvania, is to be found in its statutory (inclusive of its constitutional) enactments as interpreted by its courts and in absence of statute law in the rulings of its courts. Its laws are in consequence its statute or written and its judge-made laws, or leges non scripta. The law of the United States is to be found in its Constitution and the acts of Congress passed in pursuance thereof, and in its treaties all as interpreted by its courts, and in those matters specially committed to the judicial power in the rulings of its courts. The United States has thus only a written law, except in these latter matters, in which it also has a judge-made law. The judge-made laws of the state may be changed by the state Legislature, so far as its Constitution permits, and so likewise the maritime law of the United States may, generally speaking, be changed by Congress....."

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52 C. J. S. p. 1025

"The law of a state is to be found in its statutory and constitutional enactments as interpreted by its courts and, in the absence of statute law, in the rulings of its courts. Its laws are, in consequence, its statutes or written law, and its judge-made laws or leges non scripta...."

Argument as to Appellee's question, which is as

follows:

> "Where the Motion to Quash filed against an Information is based, among other things, upon independent grounds that the Information is defective for failure to contain sufficient averments, as well as on the ground involving the construction of a Federal statute; and where there is grave question as to the sufficiency of the Information to state a cause of action for lack of necessary averments; and where the court might well have quashed the Information upon the ground of insufficient averments; and the court, being of the opinion that the Federal statute did not apply, based its order thereon, and thus refrained, as unnecessary, from discussing or considering the other defects in the Information;—does an appeal from such an order lie direct to the Supreme Court of the United States, or should it have been taken to the Circuit Court of Appeals?"

In this connection, we submit that the sufficiency of the averments of the Information to state an offense is challenged in this case by the Motion to Quash. We contend that the scope of the Order of the Court not only covers the grounds dealt with, but also any other grounds that might have been dealt with leading to the **same conclusion.** The Court might well have felt that the Information was bad because the Federal statute did not apply, and **also** because the averments were **insufficient.** Having decided that the Federal statute did not apply, it was unnecessary to incorporate the other; or the learned Judge having examined the one ground and finding therein sufficient reason for quashing the Information, might have deemed it unnecessary to consider all the other grounds that might lead him to the same conclusion. The Information should be quashed if there is **one** single ground in the motion to quash that is good. There may be two or six; the Court, having found **one**, proceeded to quash it; but involved in that Order are **all** the grounds which might have led the Court to the same conclusion. We submit, therefore, that the Appellant has misconceived its remedy and should have taken its appeal to the United States Circuit Court of Appeals.

In the case of **U. S. v. Swift & Co.**, 318 U. S. 442, 87 L. Ed. 889, 63 S. Ct. 684, it was held that an appeal could not be taken directly to the Supreme Court where the District Court based its decision in part at least on the inadequacy of the indictment to charge the alleged offense. Furthermore, in **U. S. v. Pepper Bros.**, 142 F. 2d, 340, it was held that if the information was quashed on the ground that the information was defective for failure to set out sufficient averments, as well as on the ground involving construction of a Federal statute, the appeal was properly taken to the circuit court of appeals rather than directly to the United States Supreme Court, and that the circuit court of appeals could review the district court's construction of the statute, as well as its ruling as to the insufficiency of the information.

CONCLUSION

We respectfully submit that the district court's interpretation of the statute was not erroneous, but was in accordance with the language of the Act of Congress, and that Appellant's contention would do nothing less than create **constructive offenses** under United States law; that by the language of the Act it does not apply to regulations of a commission or any executive officer, changeable at will, with no substance or permanence—not codified among the statutes of the State, and impossible of such codification.

We further submit that there is encompassed within the court's order not only the ground specifically discussed therein, for quashing the Information, but all other grounds raised in the motion which might have led to the same conclusion, the discussion of which was therefore unnecessary.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT

We here incorporate in our brief, and as a part thereof, our motion to dismiss the said appeal or, in the alternative, to affirm the judgment of the district court, as if the same were set out in a separate instrument, and we incorporate here by reference such portions of our foregoing brief as would be proper in connection with such motion, and we therefore do move this Honorable Court to dismiss the said appeal or, in the alternative, to affirm the judgment of the district court.

Respectfully submitted,
O. S. THACKER
CLARENCE L. THACKER
of Thacker and Thacker
Kissimmee, Florida
COUNSEL FOR APPELLEE

May, 1956

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA vs.

LUDENIA HOWARD,

trading as Stokes Fish Company,

Case No. 910 Orl. Cr.

CRIMINAL INFORMATION

The United States Attorney charges:

On or about the 16th day of May, 1955, at Sanford, Seminole County, Florida, in the Southern District of Florida, LUDENIA HOWARD, trading as Stokes Fish Company, delivered to the Railway Express Agency, Inc., for transportation from Sanford, in the State of Florida, to Macon, in the State of Georgia, 150 pounds of fresh water bream, fresh water crappie, and fresh water black bass, and such transportation was then and there contrary to the laws of the State of Florida; in violation of Section 852, Title 16, United States Code.

Vernon W. Evans, Jr.
Vernon W. Evans, Jr.
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA,
ORLANDO DIVISION
UNITED STAES OF AMERICA vs.
LUDENIA HOWARD,
trading as Stokes Fish Company,
Case No. 910 Orl. Cr.

MOTION TO QUASH INFORMATION

Comes now the Defendant, by her undersigned attorneys, and moves this Honorable Court to quash the criminal information filed against the Defendant, Ludenia Howard, upon the following grounds, to-wit:

1. The said Information fails to state a cause of action against this Defendant.

2. The said Information fails to allege that the Defendant, Ludenia Howard, had any knowledge of the nature of the said shipment delivered for said transportation.

3. The said Information fails to allege that Ludenia Howard personally delivered the alleged fish to the Railway Express Agency, Inc., for transportation.

4. Said Information fails to allege that the said Defendant, Ludenia Howard, had any personal connection with the said transaction in any way, or that she had any knowledge of the said transaction.

THACKER AND THACKER

By O. S. Thacker
O. S. Thacker
ATTORNEYS FOR DEFENDANT
P. O. Box 527, Kissimmee, Florida

I hereby certify that copy hereof has been furnished Vernon W. Evans, Jr., Esq., Assistant United States Attorney, P.O. Bldg., Tampa, Florida, by mail, this 10th day of November, A .D., 1955

O. S. Thacker
ATTORNEY

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 52

UNITED STATES OF AMERICA, APPELLANT

v.

LUDENIA HOWARD, TRADING AS STOKES FISH
COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

APPELLEE'S REPLY BRIEF

STATEMENT OF THE CASE

Criminal Information was filed against appellee, Ludenia Howard, charging that she delivered to the express company for transportation out of the state "150 pounds of fresh water bream, fresh water crappie, and fresh water black bass, and such transportation was then and there contrary to the laws of the State of Florida; in violation of Section 852, Title 16, United States Code."

The District Court quashed the Information on the ground that there is no law of the State of Florida prohibiting the transportation of the fish described in the Information. (Appellant's brief, p. 4).

In 1951 the Legislature repealed the Florida statute which had prohibited the sale or transportation of black bass and certain other fish out of Florida.

The Florida Game and Fresh Water Fish Commission (hereinafter referred to as "Florida Commission") was created by a Constitutional amendment as set out by appellant. However, the amendment creating it gave it the power to fix bag limits and to fix open and closed seasons "on a **state-wide, regional** or **local** basis, as it may find to be appropriate,...". (emphasis supplied). The said amendment also provided that "All laws fixing penalties for the violation of the provisions of this amendment... shall be enacted by the Legislature..." (Appellant's Brief, Appendix B, p. 43, 44).

Said Florida Commission, by its Rule 14.01 prohibited the transportation out of the State of Florida of black bass, bream and certain other fish (crappie was not included in this enumerated list), and all such prohibition was subject to the condition "provided, that holders of valid fishing licenses may carry out of the State or transport as personal baggage their legal bag limit thereof;..".

QUESTION PRESENTED

We think the question presented, as worded by the appellant, and particularly as expanded and enlarged in argument, is subject to some criticism and limitations. It is true that the commission was created by Florida Constitutional amendment, and this is continually emphasized as if it were a matter of significance. We think the situation is no different from what it would be had the Constitution authorized the Legislature to create the commission and the Legislature had created it and given it exactly the same powers which it has. Furthermore, since the District Court quashed the Information on the ground that there is no law of the State of Florida prohibiting the transportation of the fish described in the Information, there are two questions here involved:

(1) Do the **rules and regulations** issued by the Florida Commission, under all the circumstances surrounding the said commission and the arbitrary powers given it, constitute the "law of the State of Florida"?

(2) If the said rules and regulations do constitute the law of the State, was there such a rule or regulation as would prohibit the transportation of the fish described in the Information?

If the appellant is to prevail, both these questions must be answered in the affirmative. If either is answered in the negative, then the District Judge ruled correctly.

We think the question involved in this case is strictly limited to the case of Ludenia Howard and the rules and regulations of the Florida Commission. We strongly contend that it cannot be considered, as argued by Appellant, that it covers the rules and regulations of commissions in many other states having various and sundry restrictions upon their powers not found in connection with the Florida Commission; and in our treatment of the question involved, we expect to confine ourselves strictly to the rules and regulations of the Florida Commission which has many and varied features peculiar to itself.

ARGUMENT

I. JURISDICTION.

Because of the printing bill, which the appellee can ill afford, we wish to refer to our discussion of this question in our former brief incorporating motion to affirm or dismiss, on pages 2 and 3 and pages 15 and 16, and we incorporate the same at this point by reference.

It is the **scope** of the decision of the District Court, not alone the **reasons** for the decision, which must in the final analysis determine the correctness of the ruling.

There were several questions disposed of by the said motion other than the status of the rules and their interpretation, and while the learned judge expressed the opinion that the rules and regulations of the Florida Commission did not constitute the law of the State of Florida as contemplated in the Act of Congress, he certainly did **not** say that otherwise the Information was good.

II. ARE THE "RULES AND REGULATIONS" OF THE FLORIDA COMMISSION THE "LAW OF THE STATE OF FLORIDA" AS CONTEMPLATED BY THE ACT OF CONGRESS COMMONLY KNOWN AS THE "BLACK BASS ACT"?

This question can not be determined on a basis of loose generalities and an enunciaton of principles applicable to commissions in some of the other states where such commissions were designed to give privileges to employees of railroads and the like, but must be carefully examined for what it is—a **penal** statute, which can brand a citizen as a criminal and deprive him of his liberty.

Ludenia Howard is thus informed against in this case, and it is upon this basis and this basis alone that this question must be determined, and not upon the basis of the rules and regulations of various commissions with various and sundry powers, created for various and sundry purposes in numerous of the other states.

(A) THIS IS A PENAL STATUTE AND MUST BE STRICTLY CONSTRUED.

In this country, the liberty of its citizens is considered so important that an offense charged must be plainly within the statute. There are no constructive offenses.

United States v. Resnick et al
Same v. Acme Can Co.
299 U.S. 207; 57 S. Ct. 126

From judgment sustaining demurrer in this case and discharging the defendants, the United States appealed.

* * * * *

The Court said:

"(2-6) Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the **words used.** United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. Ed. 37; Fasulo v. United States, 272, U.S. 620, 628, 47 S. Ct. 200, 201, 71 L. Ed. 443..."

* * * * *

"Before one may be punished, it must appear that his case is plainly within the statute; there are not constructive offenses. United States v. Lacher, 134 U. S. 624, 628, 10 S. Ct. 625, 33 L. Ed. 1080; United States v. Chase, 135 U. S. 255, 261, 10 S. Ct. 756, 34 L. Ed. 117; Fasulo v. United States, supra, 272 U. S. 620, at page 629, 47 S. Ct. 200, 202, 71 L. Ed. 443..." (emphasis supplied)

50 Am. Jur., p. 430

> "S 407 Penal Statutes.—It has long been a well settled general rule that penal statutes are subject to strict construction. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. The rule is founded on the tenderness of the law for the rights of individuals; its object is to establish a certain rule, by conformity to which mankind would be safe, and the discretion of the court limited..."

(p. 433) (S 409)

> "Whatever is not plainly within the provisions of a penal statute should be regarded as without its intendment. Such a statute should not be interpreted to impose restrictions on conduct not specifically enumerated in the legislative act, or to include cases omitted by the legislature, and which do not fall within the scope of the law. The fact that the statute may be easily evaded furnishes no excuse for supplying by judicial construction that which is palpably omitted therefrom. These rules prevail even though the court thinks that the legislature ought to have made the statute more comprehensive."

The foregoing principle is certainly not contradicted by the case, cited by the Appellant, of Lilly v. **Grand Trunk R. Co.,** 317 U. S. 481. This was **not** a criminal case, but, on the contrary, the court adopted the principal of liberal construction because the statute was for the **protection of employees.** The Court said:

> "The Act, like the Safety Appliance Act, 45 U.S.C.A. No. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of

safe equipment..."

Lilly v. Grand Trunk R. Co.
317 U.S. 481; 63 Ct. 347, 351

Likewise, the case of **Atchison, T. & S. F. Ry Co.** v. Scarlett, 300 U. S. 471, does not support the contention of the Appellant and does not conflict with the foregoing principle. This again was **not a criminal prosecution,** but applied to regulations for the safety of railroad employees and, therefore, was entitled to liberal construction. Likewise, the case of **Roumanian American Winery, Inc. v. Morgenthau, 152 F. 2d 452**, cited by Appellant, does not sustain Appellant's contention. This again was **not a criminal prosecution,** but was an attempt to secure a wine producer's and wholesaler's permit, and the question was whether or not the petitioner was a fit person to have such a permit, and had therefore been complying with the Federal law and rules and regulations regulating such business. The case is wholly without application to the case at Bar. Likewise, the case of **Phillips vs. United States, 312 U.S. 246,** cited by the appellant, **was not a criminal case,** but was a suit brought to restrain further interference with the closing or completion of a dam on a river in Oklahoma, and wholly fails to support the contention of the appellant. It is without value in this case.

Williams v. Bruffy, 96 U.S. 176, is without value in this case, although the appellant has taken us back to the time of the Confederacy to try to find some authority. This was **not** a criminal case. It is wholly unlike our present case; it dealt only with the jurisdiction of the court in its effort to safeguard a citizen **against** the impairment of the obligation of a contract and to protect him from acts repugnant to the Constitution of the United States. It has no value here.

Likewise, the cases of **Lake Erie & W. R. R. Co.**

v. Pub. Util. Comm., 249 U.S. 422; Arkadelphia Co. v. St. Louis S.W. Ry. Co., 249 U.S. 134; and **Columbia System v. United States, 316 U. S. 407,** are **not criminal cases,** are not in point with the case at bar, and are wholly without value as bearing on the question involved.

As a matter of fact, a careful examination of **all the cases** cited by the appellant on this question, shows that they have not brought to this court **one single case in point,** where a criminal Federal Act has been held to automatically apply because of some law of the state in question, and where that law of the state was based upon the acts of some commission or executive officer. In this case, counsel has exhibited great diligence, and we think it fair to assume that if there were one single case that would support their position, that it would have been set out in their brief with great fanfare in adequate footlights. Our own research through Words and Phrases covering the Federal system, has failed to reveal to us one single case where this court has ever held a Federal penal statute as good except on a basis of strict construction, and where it has by interpretation made out a **constructive offense** because of various and sundry considerations outside the wording of the law itself, as contended for by the appellant in this case.

The failure of appellant to recognize this as a **penal statute** and to apply to it the law necessary in such a case constitutes the fundamental error in appellant's brief—the error which caused appellant to make arguments and cite authority that have no application to the case at bar, as they deal with situations not penal and where liberal construction is appropriate and proper. In our former brief, we pointed out that this statute was penal and must be **strictly construed,** but in appellant's brief there is absolutely no answer to this fundamental proposition. We think the reason is obvious—there can be no answer.

(B) LAW OF THE STATE IN THIS CONNECTION CONSISTS OF STATUTORY LAW AS INTERPRETED BY OUR COURTS.

We respectfully submit that the "law of the State" of Florida, as used in the Federal Black Bass Act of 1926 as a basis for criminal prosecution, had reference to the **laws** of Florida that are to be found in the statutes of the State of Florida, and as interpreted by our courts. It was never intended to include, and does not include, **rules** and **regulations** as changeable as the winds, and that can not possibly be codified and included among our State laws for the reason that they do not have the necessary permanence.

> **Stoffel v. W. J. McCahan Sugar Refining & Molasses Co., 35 Fed. 2d 602 (Penn.)**
>
> * * * *
>
> (Headnote)
>
> "2. United States, Key 5 — United States Law is to be found in Constitution, Congressional Acts, Treaties, and Matters Specially Committed to Judicial Power in Court Rulings.
>
> "Law of state is to be found in its statutory and constitutional enactments as interpreted by its courts, and, in absence of statute law, in rulings of its courts, whereas law of United States is to be found in Constitution and acts of Congress passed pursuant thereto, and in its treaties as interpreted by courts and in those matters specially committed to judicial power in rulings of its courts."
>
> * * * * *
>
> **52 C. J. S. p. 1025**
>
> "The law of a state is to be found in its statutory and constitutional enactments as inter-

> preted by its courts and, in the absence of statute law, in the rulings of its courts. Its laws are, in consequence, its statutes or written law, and its judge-made laws or leges non scripta . . ."

Again this question must be measured as a **penal statute** and no other measure is accurate or applicable. Numerous Florida cases have been cited by the appellant but not one single Florida case has been cited where our Supreme Court held to the effect that the rules and regulations of the Florida Commission was the law of the state **as contemplated by 16** U. S. C. **851,** commonly known as the Black Bass Act; and that a Federal Statute applicable only when a **law of Florida** had been violated would automatically apply to a citizen allegedly violating a **rule** of the Florida Commission. If our Supreme Court were ever to so hold, it would make no difference because such a question is strictly a Federal question, deals with a Federal statute, and any such decision would not be binding on this court. **Standard Oil Co. of California v. Johnson, 316 U.S. 481, 62 S. Ct. 1168.**

The appellant's failure to apply the yardstick of a **criminal statute** is the gravamen of the error into which they have fallen in their argument and in their presentation of authorities. In determining what is a "state law" for the purpose of determining jurisdiction of this court so that it may prevent the impairment of a contract or prevent other infringements of the Federal Constitution, great liberality is indulged to preserve the Constitution in its full vigor. In its definitions in determining the rights of an individual under rules and regulations of certain commissions in certain of the states, like railroad commissions, such statutes are liberally construed, and the rules of **such commissions** for these purposes may have the status of law and might be considered to be the law of the state for such purposes. It is a vastly different proposition when we are measuring a **criminal statute** which must be **strictly** construed and which must find a definition of the crime in the **language** of the statute or **not at all.**

The appellant contends in this connection, however, that since the Florida Legislature passed a law making the violation of the regulations of the commission a crime, these regulations then become the law of the state by virtue of such statute. This is an ingenious argument but will not bear up under close scrutiny. It is true that the Legislature has made the violations of any rules or regulations which the commission may pass, a misdemeanor. The constitutional amendment creating the commission expressly provided that penalties for such violations must be passed by the Legislature. In other words, the constitutional amendment did not trust the commission with meting out the punishment for violations of its rules. However, it is without logical or legal support to say that this makes the various rules that are now in existence, or that may hereafter be enacted, **an Act of the Legislature.** If the Legislature should decide for some reason to make the violation of municipal ordinances a misdemeanor, this certainly would not make such ordinances the Act of the Legislature and entitle them to be codified along with our laws of the state. However, the appellant in this argument takes the position that a rule of the commission regardless of how absurd or how unreasonable it may be, becomes a statutory law of the State of Florida by inference or presumption once the Legislature assessed a penalty for the violation of **all rules and regulations**; then upon this **inference** or **presumption** the appellant makes the same a Federal offense automatically because it has by this inference become the statutory law of the State of Florida. This is basing **an inference on an inference, a presumption upon a presumption** in one of the most glaring and dangerous kind of cases. It would not be sufficient to stand an attack even in a civil case. It certainly can not measure up as the basis for a **penal** statute. To say it would, would be to give to the Florida Commission the right to make, by its own arbitrary action, various and sundry acts a misdemeanor under the law of the State of Florida, and a **Federal offense** by **implication** under the Federal statute. No such basis for criminal prosecutions has ever existed anywhere in the English speaking world. We certainly can not destroy the ancient and long cherished safeguards against criminal prosecution in order to give to the Florida Commission a power not given it by the Constitutional amendment that created it—a power for which it has no use, a power wholly unnecessary to the purposes for which it was created.

(C) THE "RULES AND REGULATIONS" OF THE FLORIDA COMMISSION ARE OF SUCH A NATURE THAT THEY CAN NOT IN LAW OR REASON BE THE "LAW OF THE STATE OF FLORIDA" WITHIN THE INTENDMENT OF THE FEDERAL BLACK BASS ACT.

We frankly and fully concede that the Florida Commission is a legally constituted commission. We also concede without argument that its rules are enforced in the State of Florida, so long as these rules are within the scope of the amendment creating it. For these purposes in the State of Florida they are given the force and effect of law. However, this does not make them the law of Florida as contemplated by the Black Bass Act.

The appellant produces as one of its prime arguments that if the reasoning of the District Court in this case is adopted, then the conservation program would largely fail; that its enforcement in the states is largely through commissions of one kind or another, and that if the rules of this commission do not constitute the law of Florida, then Federal enforcement in **all** states having commissions would fall. This does not necessarily follow — and we neither admit nor deny that the rules and regulations of commissions in **other** states where such rules and regulations are **properly safeguarded**, constitute the law of that state. This is not a necessary determination in this case. We are not dealing with a conservation problem as a whole; but as to whether or not one individual, Ludenia Howard, can be convicted of a constructive Federal offense on the ground that unless she is convicted they can not properly enforce the fish laws in California or Colorado. If we must choose between constructive criminal offenses and the failure of the entire conservation program, we prefer that American liberty be preserved and that it be surrounded by all the English and American safeguards developed over a period of half a millennium.

However, such a choice is not necessary. If Congress desires that its penal statutes relative to black bass and other fish or fowl shall be automatically applied by the rule and regulation of a commission in Florida or elsewhere, then let it unequivocally and plainly say so. However, when it does, we think that it will prescribe different conditions and different restrictions to which those rules and regulations must conform from that which exist in the State of Florida at the present time.

Even if rules and regulations of a commission under **some conditions and restrictions** could be the law of a state, it does not follow that the **rules** and **regulations** of the **Florida Commission** are the law of the State of Florida. We take the position that these rules and regulations are **not** the law of Florida, and that **under the conditions and circumstances surrounding them,** and which are an integral part of their very nature, **THEY CAN NOT BE THE LAW OF FLORIDA.** Some of such reasons are:

1. When the Black Bass Act was enacted by Congress in 1926, there was no such commission in existence in the State of Florida, so the Act could not have been intended to apply thereto.

This is so obvious as to hardly justify argument, except for the position taken so vigorously by opposing counsel. To say that Congress foresaw in 1926 the Florida Commission and other similar commissions, and intended that this Act should cover the rules and regulations of such commissions, is wholly fantastic. Of course, Congress intended exactly what the language said, — that it should apply to those states where the "law of the state", as determined by the method by which all such laws were determined at that time, namely, by the Act of the Legislature, and as interpreted by its courts, made transportation illegal,—and nothing more. To now say that it applies to the rules and regulations of the Florida Commission is to enlarge the original Act of Congress by construction, and to create a constructive offense. It is to read into the Act of Congress what was not there originally.

Astute counsel for the appellant recognize this situation, but counter that in more recent years the Act has been amended and that at the time these amendments were enacted there were commissions which had various and sundry powers. However, the appellant has overlooked the fact that these amendments did not enlarge the **scope** of the original law but merely enlarged the **fish** to which the law applied. If Congress, at the time of the amendments, intended that the same should apply not only to the "law of the state" as originally enunciated, but to the rules and regulations of various commissions, it would have been a very simple matter for it to have said so while it was amending the Act otherwise. That it did not is the strongest of arguments for the proposition that it did not intend the Federal statute to become automatically operative upon the whim and caprice of some commission.

In this connection, it is interesting to note that the appellant, as an argument in its favor, quotes from the Senate and House reports accompanying the bill (Appellant's brief, pp 27, 28). We think the appellant overlooked a very important statement in this report that shows conclusively exactly what it was to which it was expected to apply:

> "It will strengthen the laws of any State wherein the taking of bass commercially is prohibited. In some States, where such law is now on the statute books, its effect is nullified . . ."

There are no rules of the Florida Commission on the "statute books" of Florida, and quite obviously this is the kind of law that the Act was intended to bolster.

2. **The rules and regulations of the Florida Commission are not considered the laws of Florida by the Commission itself. They are still the rules of the Game and Fresh Water Fish Commission, and are NOT CODIFIED WITH the laws of Florida.**

The Florida Commission calls them "rules". They are printed in a little pamphlet known as the "Wild Life Code" under the heading:

"Rules and Regulations of the Game and Fresh Water Fish Commission"

In the same pamphlet are printed numerous sections of the Florida statutes. These sections are printed under the heading:

"Laws of Florida"

(See copy of Code Book deposited with Court by appellant—Appellant's brief, p. 37)

The laws of Florida are published by the Secretary of State as Florida Statutes, and by Harrison Company and West Publishing Company as the Florida Statutes Annotated. These laws are revised every two years after the Legislature adjourns, and they remain the law, as interpreted by our courts, until the Legislature convenes two years hence. The **rules** of the Game and Fresh Water Fish Commission are found nowhere among these laws. Great formality and great exactness is required in the handling of of a law even after the Legislature has voted the same. This is to the end that the final reported wording of the law may be kept Simon pure and accurate." There are no such safeguards surrounding the hastily constructed rules and regulations of the Florida Commission. The only requirement is that if it is of State-wide application it shall become effective thirty days after the filing of a certified copy in the office of the Secretary of State. If they are not of State-wide application, then twenty days or even none.

3. **The rules and regulations of the Florida Commission may be local or regional, as contrasted with State-wide, — which could result in such confusion that a Federal penal statute could not be based thereon.**

This is a very fundamental defect in the rules and regulations, and comes from the Constitutional amendment which creates the Florida Commission. It provides that said commission shall have the power to fix bag limits and to fix open and closed seasons "on a state-wide, regional or local basis, as it may find to be appropriate" (Appellant's Brief, Appendix B, p. 43). Under this provision the Commission can declare a closed season on black bass, etc. in Osceola County, Florida, but can say that such bass can be taken in Seminole County, or regionally by saying that they can be taken in the counties bordering the St. Johns River. They can then say that such bass taken legally can be transported anywhere in the State of Florida while maintaining that bass taken in Osceola County cannot be transported anywhere. In other words if such black bass are caught in Osceola County and shipped into Georgia, the Federal statute would apply and it would be a Federal criminal offense; but if such shipment originated in Seminole County or any of the other counties bordering on the St. Johns river, then they could be legally shipped into Georgia and the Federal statute would not apply. We can ask but we cannot answer: What is the status of fish caught in Osceola County but shipped from some point on the St. Johns; or caught on the St. Johns (where they are legally caught) if shipped from Osceola County where it is illegal to ship them if caught there. To what quagmire has the position of the Federal statute fallen? It will take more than the glittering general conclusions of counsel for the Government to make it convincing that Congress ever intended to give **such** a commission, possessing such a confusion of powers, a **Federal book of blank Informations, all signed up ready to use as it sees fit.** We find it impossible to believe that Congress, when it passed the Black Bass Act, ever intended it to apply under such situations, or ever intended the Federal officials to embark upon such a snipe hunting expedition. To now read such into the law, is to read into it what is not there.

4. **The rules and regulations of the Florida Commission are so changeable that they are without the permanence or substance required to give our citizens knowledge of them, so they can be the "law of the State of Florida" in the sense that they can invoke automatically a Federal penal statute.**

Herein lies a fundamental weakness of the rules and regulations which will forever prevent them as now constituted from becoming the "law of the state" in the sense that a Federal penal statute can be predicated thereon. A law must be definite and certain, readily found, properly codified, so that the people who are required to obey it can with reasonable diligence know it. Herein lies the very fundamental and impelling reason why these rules and regulations are not found among our statutes. They may be changed before the ink is dry. A rule of the Florida Commission may be passed today and filed with the Secretary of State. The Legislature says it shall become effective thirty days thereafter if of statewide application. Whether it had the authority to say that is questionable. But at any rate, tomorrow at an early breakfast the Florida Commission can change its mind and change its rule, and file a new pronouncement with the Secretary of State. If the rule is not of state-wide application, the statute says it need be filed but twenty days, and then in a subsequent section it takes it all back and says it does not have to be filed at all—it was only joking,—it is **not mandatory**. The Florida Commission would not be likely to change its mind every day, but there is certainly no restriction upon how often it can do so, except its own discretion.

The Legislature, recognizing the inability of the citizens, or even the lawyers of the state, to know what a rule is at a particular moment, prescribes certain things that the Commission should do, like sending copies to the county judge, and advertising to a limited extent. But again these are merely directory and **not mandatory** and do not cure the evil. (Section 372.021, Florida Statutes Annotated, Appellant's Brief, Appendix B, pp 44, 45, 46). This little pamphlet can be obtained from the Commission, and may be shown to be authenticated as of a **particular** date written in pen and ink, so that if the rule or regulation is changed the next day, the next week, or the next month, they can write in a different date and pin on whatever change has been made.

Counsel for appellant (Appellant's Brief, p. 37) advise us that they have obtained such a copy of this little "Code Book" dated June 29, 1956, together with amendments certified on July 17, 1956. We are very glad of this, as it emphasizes our point. Before a copy of appellant's brief had reached us, bragging about the virtues of this Code Book, any part or all of the rules and regulations might have been changed, and unless able counsel for the appellant has **since** then contacted the Florida Commission, they know no more about what the **present** rules and regulations of the Commission are than we do, which is exactly nothing.

Appellant in its brief, pp 37, 38, recognizes this difficulty and seeks to overcome it by pointing out that one holding a license as a wholesale fish dealer or valid fishing license, is advised of the law because such license contains on the back thereof a synopsis of the fresh water fishing laws of the state. By this, we presume appellant means the rules and regulations of the Florida Commission. Such license is usually obtained several days or a few weeks before the time the old license expires. It takes a little while to print it. If that synopsis correctly stated the rules at the time it was delivered to the printer, it could easily be null and void before the date it became operative, or at any time thereafter. To say that a person interested in obeying the law would have no difficulty in discovering the applicable regulations is to wholly ignore the factual situation.

The appellant has referred considerably to **Bronson v. Florida, 83 So. 2d 849.** This case dealt primarily with resisting arrest. The defendant had in his possession alligator hides under eight feet in length, which was in violation of a rule of the Florida Commission. Before the decision was even handed down in that case,the rule had been changed to alligator hides under **six** feet. **Now** it may be six feet, two feet, or no feet. There probably are not ten lawyers in the State of Florida who at the present moment would **know**, unless he has had occasion within the last few days to secure from the Florida Commission the little pamphlet certified in ink as being one of a certain date. Even then, without telephoning, he would not know but what the rule had been changed the next day. The several Florida decisions cited by Appellant are not determinative of the issue in this case. We have already readily admitted that the **rules** of the Commission are enforceable in the State, but it does not follow that a penal Federal Statute automatically attaches, when to do so would violate the **words** and **principles** in such Statute.

A most essential thing in this United States is for its citizens to obey and bow to the majesty of the law, and respect it. This implies, as a necessary corollary. that the law can be known so that it can be obeyed, and so that it can be respected. One can not obey, nor can one respect, the unknown, and this great objective is a two-fold proposition. It places upon the lawmakers the duty of making and explaining its law so that it can be known and obeyed, as well as the duty upon the citizen to strive diligently to know and to obey it. To extend by construction a Federal statute, criminal in its nature, based upon the **law** of Florida, so as to make that Federal statute conditioned upon the violation of an **arbitrary and changing** rule or regulation, is to violate the foregoing principles.

Furthermore, to extend the basis of the Federal statute beyond the State law, as codified in our statute books, is to start down a path, the end of which we cannot see. If this can be applied to a **rule** of the

Game and Fresh Water Fish Commission of five members, it would likewise apply if the number were reduced to three—to two—to one. If it applies when the only restriction upon its change is the **whim** and **feelings** of the Commission, it could be applied to the whim and feelings of a single individual. If it can be applied when the rule need not be codified and when the only requirement is that it be filed with the Secretary of State within thirty days, it would likewise be applicable if the thirty days were reduced to twenty—to ten—abolished altogether.

> On this question this court has already spoken: "... every citizen is entitled to fair warning of the traps which the criminal law lays."
>
> **United States v. Carroll, 345 U.S. 457, 460; 73 S. Ct. 757, 759**

III. UNDER THE "RULES AND REGULATIONS" OF THE FLORIDA COMMISSION, THE FACTS ALLEGED IN THE INFORMATION DO NOT CONSTITUTE AN OFFENSE.

In the alternative, if the rules and regulations of the Florida Commission constituted the **law** of the state (which presumption we stoutly deny) in the construction of the law then applicable to the Information in question, it would be necessary that the Information state a cause of action under the **rules and regulations.** The Information charged that Ludenia Howard delivered for shipment "150 pounds of fresh water bream, fresh water crappie, and fresh water black bass, and such transportation was then and there contrary to the laws of the State of Florida; in violation of Section 852, Title 16, United States Code." Now, under the rules and regulations of the Florida Commission (Rule 14.01, Appellant's brief, Appendix B, pp. 48, 49) "crappie" is **not named in the list of fish,** the transportation of which is prohibited; neither is "crappie" defined anywhere in said rules which rules out any suggestion that the Commission might have intended to prohibit its transportation by some inference, presumptin, or construction. Hence the transportation of the same is not made a violation of the rule and regulation cited by appellant. Consequently, the only violation would relate to the black bass and to the bream. Since there is no allegation as to what part of the 150 pounds was comprised of black bass and bream, there is no way that it can be ascertained under the rules and regulations (presumed law of the State of Florida) as to how much of the said 150 pounds was legal and what part was illegal. To put the matter absurdly, but within the scope of the Information, as measured by the rules and regulations, the 150 pounds shipment might be comprised entirely of crappie except for a piece of bass and a piece of bream which a vicious crappie had bitten off but got caught before he had swallowed it. In other words, the amount of black bass and the amount of bream in the said shipment could be so small that the law would not take notice of it under the doctrine of **de minimis non curat lex**—a trifle too small for the law to notice.

Or there could be 140 pounds of crappie, 5 pounds of bass, and 5 pounds of bream. This would be no offense at all if the amount of bream and bass were within the bag limit.

In other words, if the Information were measured by the rules and regulations of the Commission it would then be necessary to interpret these rules and regulations as the applicable law, and this law would not spell an offense.

CONCLUSION

When Congress passed this Act in question in 1926, it certainly did not have in mind any rules of the State Game and Fresh Water Fish Commission, because such Commission did not exist until January 1, 1943. Had Congress intended that this Act should apply to rules of a **commission,** or the orders or rules of some State executive officer, not codified, not known, nor of any regular or definite standing—then the Congressional Act could well have cured this ambiguity by saying also the "rules and regulations of any commission or any official, when such rules and regulations are enforced within the state." But the Congressional Act **did not say this!** To read this into it now, by **construction,** is to read into it what was not said and what was not there before. To make this statute the basis of this criminal prosecution, it is necessary to stretch it by interpretation beyond the language of the Act—we believe beyond the intention of the Act—and create a **constructive offense.** We respectfully submit that this is not only outside the language of the Statute as passed by the Congress; but it is not in accordance with its intendments, and that it imperils and jeopardizes, without due process of law, the liberty of our citizens.

We respectfully submit that the district court's interpretation of the statute was not erroneous, but was in accordance with the language of the Act of Congress; that Appellant's contention would do nothing less than create **constructive offenses** under United States law; and that by the language of the Act it does not apply to regulations of a commission or any executive officer ,changeable at will, with no substance or permanence—not codified among the statutes of the State, and impossible of such codification.

Respectfully submitted,

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